

STUDIES IN CONSTITUTIONAL LAW

**REGULATION
OF COMMERCE**

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By THOMAS H. CALVERT, Annotator of the Constitution in "Federal Statutes, Annotated."

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STUDIES IN CONSTITUTIONAL LAW

REGULATION OF COMMERCE

UNDER THE

FEDERAL CONSTITUTION

BY

THOMAS H. CALVERT

ANNOTATOR OF THE CONSTITUTION IN "FEDERAL STATUTES, ANNOTATED"



EDWARD THOMPSON COMPANY
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GENERAL

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PREFACE

IN the preparation of such a work as this an author is under the temptation unduly to dwell on matters of contemporary interest, and thus to lose the sense of due proportion. In taking up and prosecuting the work, it was my purpose and it has been my effort to make a clear, coherent, and comprehensive presentation of the subject, strictly within its scope, convenient for the practicing lawyer and the legislator, while useful also as a text-book for the student. The construction, scope, and effect of statutes passed in exercise of the power of Congress to regulate commerce have not been discussed unless it seemed that a fundamental question was involved in the particular consideration.

This presentation is mainly based upon a careful examination of all the cases on the subject decided by the Supreme Court of the United States. On the moot question of the existence and nature of a federal police power I have endeavored to find and state a general principle. The working out of the principle has relation chiefly to the question of the power to regulate commerce as including the power to prohibit, and the relation of this power to a consideration of the power of Congress indirectly to regulate manufacture by denying the facilities of interstate transportation to commodities not manufactured under conditions prescribed by Congress. In separate parts of the work these two topics are

treated, and the principle suggested can perhaps be understood only by referring to both parts.

No other department of constitutional law furnishes such an opportunity to acquire a knowledge of the respective powers of the federal and State governments as does a study of this subject. The enlightenment acquired reveals the existence of an exclusive authority of the States as to all matters concerning their domestic commerce, and a power in the States concurrent with, but subordinate to, that of Congress respecting many matters affecting the instrumentalities of interstate and foreign commerce.

We hear much said about enlarging the powers of the federal government by judicial construction. Whatever else the suggestion may allude to, it cannot refer to the power of Congress to regulate the instrumentalities of interstate commerce. It is impossible to give any attention to the subject without being impressed with the wide powers possessed by the States over the instrumentalities of commerce, even in matters having relation to and affecting their interstate and foreign business. The question of the expediency of the adoption, whether by the national government or by the States, of regulations which may be said to be within the concurrent powers of the federal and State governments, but inoperative as to the State enactment when Congress has legislated on the particular subject, must in many instances be determined by the sufficiency of the action of the States to meet the local requirements. The failure of the States to adopt regulations to meet a supposed need, either by indifference to the wrong or delinquency or by such an exercise of the power that, on account of

PREFACE

the absolute requirements imposed, a regulation cannot pass the supreme test of reasonableness, results in agitation for federal regulation of matters concerning which the power of Congress is undoubted. There would be no need to invoke the exercise of the federal power in such cases if States adopted reasonable regulations to satisfy local requirements or opinion.

This topic may be illustrated by comparing the attempt of the State of Texas to meet the car shortage problem, and the laws of several of the States prohibiting the running of freight trains on Sunday. In the case respecting the Texas statute, the court seemed careful to avoid saying that the subject-matter of the statute is not a proper matter for the exercise of the State police power. Indeed, it was strongly intimated that such a regulation is within the same class of subjects as those regarding the speed of trains, the length and frequency of stops, the heating, lighting, and ventilation of passenger cars, and the furnishing of food and water to cattle and live stock. It was, however, the failure of the statute to make allowance for contingencies which good management and a desire to fulfil all legal requirements cannot provide for, that constrained the court to declare the statute to be unreasonable and invalid. If the State laws prohibiting the transportation of freight on Sundays required that freight trains should stop at twelve o'clock on Saturday night, it cannot be supposed that they would be sustained as to trains carrying interstate and foreign freight. But by permitting trains running on Saturday night to run through to destination or to reach, before eight or nine o'clock on Sunday morning, a convenient place to wait

over, every requirement of reasonableness was met. Many such illustrations may be found by the investigator.

The Federal Employers' Liability Act of June 11, 1906, has recently been the subject of judicial condemnation.¹ The statute in part and in effect declares the liability of every common carrier engaged in commerce between the several States for injuries to any of its employees, abrogates the assumption of risk and fellow-servant doctrines, and imposes the doctrine of comparative negligence.

The first point considered by the court was whether regulating the relation of master and servant can be regarded as a subject of commerce or as a rule for carrying it on. Though the court answered the point in the negative, we have the impression that it has never been questioned until this case that the power of Congress over the instrumentalities of commerce covers every relation and necessarily includes the declaration of the rules of liability of interstate carriers to their employees, and especially when such rules are obviously adopted for the purpose of impressing upon the carriers the duty of exercising every precaution for the safety of their employees.

The second point of objection is one which suggests greater doubt and difficulty. It is that by reason of the terms of the statute—not, so the court thought, restricted to interstate carriers and their employees engaged strictly in interstate transportation—it is applicable to domestic as well as to interstate commerce, and, inasmuch as it can-

¹ In the case of *Brooks v. Southern Pac. R. Co.*, decided by Hon. Walter Evans, District Judge, holding the United States Circuit Court for the Western District of Kentucky.

not be limited by construction, is invalid. The cases cited by the court to support this contention had relation either to matters connected with the executive department, or to declaring certain acts as crimes. In the one class of cases it may be said that whenever Congress imposes duties upon administrative or executive officers the instructions must be specific and not leave the statute open to construction. Especially when the constitutional rights of persons may be involved, the leaving of questions of construction, requiring a limitation of the exercise of the powers under the statute within constitutional bounds, to such officers would be imposing upon them judicial duties. In the other class of cases the rule requiring the strict construction of criminal statutes prevents the courts from giving to a statute, general and not separable in its terms, a narrower meaning than it is manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of Congress.

This statute, however, simply declares a rule of civil liability which can be invoked only in a pending action and applied by a court of law in a proper case. In an action for damages for personal injuries sustained by the employee of a common carrier, pending in a federal court, the court, in the absence of a federal rule of liability, would be under the necessity of searching the whole realm of the common law for a rule of decision, as modified probably by a statute of the State within which the court might be sitting. It can then surely be no strain on judicial conscience or duty to apply in proper cases the rules of liability declared by a federal statute, though the statute be open to possi-

PREFACE

ble verbal criticism. It may be further safely said that if Congress were to declare any rule of liability, or by a statute general in terms were to modify or abrogate any common-law rule, it would be the duty of the courts to apply the rule in all proper cases arising under the Constitution, laws, or treaties of the United States, and in all cases arising out of transactions of which the national government has legislative jurisdiction. However this may be, the Supreme Court of the United States will doubtless be given an opportunity, at an early date, to pass upon the validity of this particular statute.

T. H. C.

NORTHPORT, N. Y.,
February, 1907.

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PART I.

*THE CONSTITUTIONAL PROVISIONS AND
THE GENERAL POWER OF CONGRESS
AND THE STATES.*



REGULATION OF COMMERCE.

CHAPTER I.

THE CONSTITUTIONAL PROVISIONS GENERALLY.

REASONS FOR THE ADOPTION OF THE CONSTITUTION.

MUCH has been said and written as to the causes which brought about the adoption of the United States Constitution, which, after ratification by the requisite number of States, went into effect on the first Wednesday in March, 1789. It is not within the scope of this work to inquire into the many causes of weakness which contributed to the downfall of the first-formed government of "The United States of America." For our purpose it will be sufficient to show that one of the chief causes of its adoption was the need for a uniform system of regulating commerce among the several States themselves, and with foreign countries, which the impotence of the federal government and the jealousies and selfishness of the respective States rendered impossible under the Confederation. It is necessary to keep this in mind, for one of the elementary and fundamental canons of constitutional construction requires a grant of power or a prohibition to be interpreted in view of the mischiefs it was intended to remedy.

Chapter
I.

Need for
uniform
system of
regulating
commerce.

Chapter
I.

No federal
control of
commerce
under the
Confeder-
ation.

The "Articles of Confederation and Perpetual Union" established a system which was nothing more than a federation of sovereign and independent States. The Congress of the federation was without power to tax, but was dependent wholly upon contributions by the States, made in response to requisitions of Congress. The government had no adequate control of commerce. Congress had no power to raise revenue by way of duties on imports, and the seaboard States not only would not consent to the exercise of this power by Congress, but burdened the commerce of other States by levying duties on imported goods which were designed for States having no ports,¹ and by imposing duties of tonnage.²

In a concurring opinion in an early case, Mr. Justice Johnson said: "For a century the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State; and now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad."³ And in a later case, Chief Justice Marshall observed: "The oppressed and degraded state of commerce previous to the adoption of the

¹ *Woodruff v. Parham*, (1868) 8 Wall. (U. S.) 123.

² See *Cook v. Pennsylvania*, (1878) 97 U. S. 566, and *State Tonnage Tax Cases*, (1870) 12 Wall. (U. S.) 204.

³ *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 1.

Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress.”⁴

THE CLAUSES GENERALLY.

It was to meet this condition that the Constitution was proposed by the Constitutional Convention and ratified by the States, and to remedy the faults suggested, that the following clauses, having a direct or incidental reference to commerce, were adopted:

The clauses
enumerated.

Article I, Section 8. The Congress shall have power . . . to regulate commerce with

⁴ *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 419.

“The conflict between the commercial regulations of the several States was destructive to their harmony and fatal to their commercial interests abroad, and this was the mischief intended to be obviated by the grant to the Congress of the power to regulate commerce with foreign nations and among the States.” *Per* Chief Justice Fuller, in *Lehigh Valley R. Co. v. Pennsylvania*, (1892) 145 U. S. 192.

Chapter
I

foreign nations, and among the several States, and with the Indian tribes.

Article I, Section 9. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.⁵

Article I, Section 9. No tax or duty shall be laid on articles exported from any State.

Article I, Section 9. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

Article I, Section 10. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

Article I, Section 10. No State shall, without the consent of Congress, lay any duty of tonnage.

The first clause above given is the general grant of power to Congress to regulate foreign and inter-

⁵ See *People v. Compagnie Générale Transatlantique*, (1882) 107 U. S. 59, referred to *infra*, p. 267.

Chapter
I.The general
grant of
power and
specific
limitations.

state commerce and intercourse with the Indian tribes. Article I, section 9, of the Constitution consists of prohibitions or limitations on the exercise of the powers granted to the national government, and the clauses quoted from that section may be considered as limitations on the power given to Congress to regulate commerce; though the one prohibiting the laying of any tax or duty on articles exported from any State should perhaps be considered rather as a limitation on the federal taxing power than on the power to regulate commerce. Article I, section 10, contains limitations on the powers of the States, and the two clauses set out are in the nature of express prohibitions in addition to or emphasizing such limitations as are implied by the grant of power to Congress to regulate commerce "with foreign nations, and among the several States, and with the Indian tribes."

WITH THE INDIAN TRIBES.

The relation between the national government and the Indians is fast becoming a matter of mere historic interest. In a recent case,⁶ Mr. Justice Brewer reviews the course of this relation, and the dealings of the government with the Indian tribes, from early times. He therein shows that the Indian tribes were treated as possessing some of the attributes of nations with which the government made treaties. The policy of the government was to put a stop to the wanderings of these tribes and locate them on some definite territory or reservation, and there to establish for them a communal or tribal life. This policy was effected sometimes by treaty

Originally
treated as
separate
nations.

⁶ Matter of Heff, (1905) 197 U. S. 488.

Chapter
I.

Subjected
to direct
federal
legislation.

and sometimes by force. The practice of dealing with the Indian tribes as separate nations was changed in 1871 by a proviso inserted in an Indian appropriation act, which reads: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."⁷ From that time the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress, and have been treated, in the fullest sense, as wards of the nation.

Emancipa-
tion from
federal con-
trol.

Of late years, however, said Mr. Justice Brewer, "a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress."

Effect of
abandon-
ment of
tribal
relations.

When, in pursuance of this policy of encouraging the abandonment by Indians of their tribal relations, the national government grants the privileges

⁷ Act of March 3, 1871, c. 120, carried forward into Rev. Stat. U. S., § 2079, 3 Fed. Stat. Annot. 357.

of citizenship to an Indian, gives him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; the emancipation from federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the State, and this emancipation from federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property.

Until this emancipation takes place, the commercial relations with the Indians and the Indian tribes remain under the control of Congress. The power of Congress over commerce between a State and the Indian Territory is not less than its power over commerce among the States.⁸ And when a tribe exists as a distinct community within the limits of a State, occupying its own territory with boundaries accurately described, intercourse with it is by the Constitution vested in the government of the United States.⁹

Federal
control of
intercourse.

⁸ *Hanley v. Kansas City Southern R. Co.*, (1903) 187 U. S. 617.

Congress has the power to regulate the ownership and distribution of their property, *Morris v. Hitchcock*, (1904) 194 U. S. 388; *Cherokee Nation v. Hitchcock*, (1902) 187 U. S. 294; *Stephens v. Cherokee Nation*, (1899) 174 U. S. 445; and to regulate the sale of intoxicating liquors, *Ex p. Crow Dog*, (1883) 109 U. S. 556; *U. S. v. Forty-three Gallons Whiskey*, (1883) 108 U. S. 491; *U. S. v. Forty-three Gallons Whiskey*, (1876) 93 U. S. 188.

⁹ *U. S. v. Kagama*, (1886) 118 U. S. 375; *Howard v. Ingersoll*, (1851) 13 How. (U. S.) 381; *Worcester v. Georgia*, (1832) 6 Pet. (U. S.) 515.

Chapter
I.

DISTRICT OF COLUMBIA AND THE TERRITORIES.

The Constitution provides that Congress shall have power "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States,"¹ and further provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."²

Legislative
power over
the District
of Colum-
bia.

Under the former clause, within the District of Columbia, organized by cessions of territory from the States of Virginia and Maryland, the national and local powers of government are united in the government of the Union.³ As to the Territories, it was early considered that the latter clause was the foundation upon which the territorial governments rest,⁴ but in later times, as questions arose regarding the government of territory acquired by conquest or treaty, the power of Congress in such cases was rather regarded as an incident of sovereignty and as arising from the necessities of the case and the inability of the States to act upon the subject. In *U. S. v. Kagama*,⁵ Mr. Justice Miller said that "this

Power over
Territories
as an inci-
dent of
sovereignty.

The Cherokees in North Carolina, who dissolved their connection with their nation when they refused to accompany the tribe on its removal, became citizens of the State and bound by its laws. *Cherokee Trust Funds*, (1886) 117 U. S. 288.

¹ Article I, § 8, cl. 17.

² Article IV, § 3, cl. 2.

³ *Capital Traction Co. v. Hof*, (1899) 174 U. S. 1; *Shoemaker v. U. S.*, (1893) 147 U. S. 282; *Pollard v. Hagan*, (1845) 3 How. (U. S.) 212; *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 264.

⁴ *U. S. v. Gratiot*, (1840) 14 Pet. (U. S.) 526.

⁵ (1886) 118 U. S. 375.

power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else."

It is not, of course, within the scope of this work to discuss at large the powers of the national government over the District of Columbia and the Territories, but the question has occasionally arisen as to the relation of the District and the Territories to commerce among the States. In *Downes v. Bidwell*,⁶ Mr. Justice Brown gives a well-nigh exhaustive review of the cases involving, in a constitutional sense, the government of the District and the Territories, and thus summarizes the decisions: "Eliminating, then, from the opinions of this court all expressions unnecessary to the disposition of the particular case, and gleaning therefrom the exact point decided in each, the following propositions may be considered as established:

Relation of
the District
and the Ter-
ritories to
commerce
among the
States.

"1. That the District of Columbia and the Territories are not States, within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different States;

"2. That Territories are not States, within the meaning of Revised Statutes, § 709, permitting writs of error from this court in cases where the validity of a State statute is drawn in question;

"3. That the District of Columbia and the Ter-

⁶ (1901) 182 U. S. 244.

Chapter
I.

ritories are States, as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property;

“ 4. That the Territories are not within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to establish;

“ 5. That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully provide for such trials before consular tribunals, without the intervention of a grand or petit jury;

“ 6. That where the Constitution has been once formally extended by Congress to Territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.”

Municipal
powers of
the District
of Colum-
bia.

It was argued, in *Stoutenburgh v. Hennick*,⁷ that it is beyond the power of Congress to pass a law, solely for the District of Columbia, licensing the business of selling goods by sample. In that case an act of the legislative assembly of the District of Columbia, requiring commercial agents whose business it was to offer merchandise for sale by sample to take out a license, was declared to be invalid as a regulation of commerce. In a dissenting opinion, Mr. Justice Miller said: “ Commerce by a citizen of one State, in order to come within the constitutional provision, must be commerce with a citizen of another State; and where one of the parties is a citizen of a Territory, or of the District of Columbia, or of any other place out of a State of the Union, it is not commerce among the citizens of the several States.” Nevertheless, the decision of the court was not put upon the ground that it is beyond the

power of Congress to pass a law of that character solely for the District, but because, having express power "to exercise exclusive legislation in all cases whatsoever" over the District, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible, and having created the District of Columbia "a body corporate for municipal purposes," Congress could only authorize it to exercise municipal powers. As the legislative assembly of the District could not exercise other than municipal powers, it was without authority to enact a law on a subject which called for national legislation.⁸

And again, in *Hanley v. Kansas City Southern R. Co.*,⁹ the court avoided a direct holding as to the power of Congress over the Territories in their commercial relations with the States, being satisfied, on this point, with the suggestion, through Mr.

Regulation
of com-
merce be-
tween the
Territories
and the
States.

⁸ In *Beitzell v. District of Columbia*, (1903) 21 App. Cas. (D. C.) 49, it was held that the provision of the Act of Congress of July 1, 1902, relating to the District of Columbia, and requiring any one engaged in the business of a brewer's agent to pay a license tax, was a local act and intended to have a local operation only, and was not applicable to the case of a local agent of a firm of brewers whose brewery and offices were located in another State, the court saying: "It is unnecessary to hold in this case that this District can be rightfully treated as a State within the meaning of the Constitution, in considering the question of the power of Congress to regulate commerce as between this District and the several States of the Union. But in considering the effect of the Act in question, it is not fair to presume, in the absence of an express declaration to that effect, that Congress intended to disregard the settled principle of commercial intercourse of the country, which, as embodied in the Constitution of the country, prohibits a State from imposing a license tax upon persons representing owners of property outside of the State, for the privilege of soliciting orders within it, as agents of such owners, for property to be shipped to persons within the State."

⁹ (1903) 187 U. S. 617.

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Justice Holmes, that "it may be assumed that this power of Congress over commerce between Arkansas and the Indian Territory is not less than its power over commerce among the States."¹ This was a case involving the power of the State of Arkansas to regulate the rates on goods shipped from one point in Arkansas to another point in the same State, on a through bill of lading, part of the journey being through the Indian Territory, and the total distance being about fifty-two miles in Arkansas and about sixty-four in the Indian Territory. In holding that the transportation of the goods was not within the regulating power of the State, the court put its decision upon the ground stated by Mr. Justice Field in *Pacific Coast Steamship Co. v. Railroad Com'rs*,² that "to bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State."³

¹ *Citing Stoutenburgh v. Hennick*, (1889) 129 U. S. 141.

² (1883) 9 Sawy. (U. S.) 253.

³ In *U. S. v. Whelpley*, (1903) 125 Fed. Rep. 616, District Judge McDowell said: "If Chief Justice Marshall's ruling in *Hepburn v. Ellzey*, (1804) 2 Cranch (U. S.) 445, is to be the guide in construing the meaning of the word 'State,' as found in the Constitution, it may seem difficult to find in the commerce clause authority to forbid shipments from any State to a Territory or to the District of Columbia. I am not myself expressing an opinion on the constitutionality of an Act of Congress regulating commerce from a State to the District of Columbia. I am inclined to think that the implication from the decision in *Stoutenburgh v. Hennick*, (1889) 129 U. S. 141, 9 U. S. Sup. Ct. Rep. 256, and the language of Mr. Justice Holmes in *Hanley v. Kansas City Southern R. Co.*, (1903) 187 U. S. 617, 23 U. S. Sup. Ct. Rep. 214, are sufficient to prevent a subordinate federal court from holding such an enactment invalid, even if so inclined." In the *Hepburn v. Ellzey* case, referred to by Judge McDowell, it was held that the District of Columbia is not a "State" within the meaning of Article III, section 2, of the Con-

 APPLICATION OF COMMON LAW AND STATE STATUTORY
 RULES.

 Chapter
 I.

There is no common law of the United States in the sense of a national customary law,⁴ no abstract pervading principle of the common law under which the federal courts can take jurisdiction. Thus, there are no common-law offenses against the United States,⁵ nor is there a common law of copyright. The federal courts have jurisdiction only of such offenses as are defined by Acts of Congress, and copyright is dependent wholly upon legislation by Congress under the grant of power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."⁶ But this does not mean, in cases of which the federal courts have jurisdiction, that they are without rules of decision in the absence of statutory enactment. It has frequently been declared by the courts that the principles and definitions of the common law will be followed and applied in the construction of constitutions, statutes, and contracts.

No national
 common
 law.

Principles of the common law applicable to common carriers regulated railway traffic before the enactment of the Interstate Commerce Act of February 4, 1887.⁷ *Kentucky Bank v. Adams Express*

Common-
 law princi-
 ples appli-
 cable to
 common
 carriers.

stitution, giving jurisdiction to the federal courts of cases between citizens of different States.

⁴ See *Smith v. Alabama*, (1888) 124 U. S. 465; *Wheaton v. Peters*, (1834) 8 Pet. (U. S.) 591.

⁵ *U. S. v. Eaton*, (1892) 144 U. S. 677; *Benson v. McMahon*, (1888) 127 U. S. 457; *U. S. v. Britton*, (1883) 108 U. S. 199; *U. S. v. Worrall*, (1798) 2 Dall. (U. S.) 384.

⁶ *Banks v. Manchester*, (1888) 128 U. S. 244.

⁷ Ch. 104, 3 Fed. Stat. Annot. 809. See *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, (1892) 145 U. S. 263.

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I.

*Co.*⁸ was an action to recover the value of packages containing money, which, on their transportation from one State to another in charge of a messenger of the company, were destroyed by fire. The express company set up in defense a clause in the bill of lading exempting them from liability for loss by fire. It was held that the defendants, as common carriers, could not, by any contract, relieve themselves from responsibility for their own negligence or that of their servants and agents, and this because such a contract is unreasonable and contrary to public policy. It was said by Mr. Justice Brewer, in *Western Union Tel. Co. v. Call Pub. Co.*,⁹ that "the whole argument of the opinion [in the above case] proceeds upon the assumption that the common-law rule in respect to common carriers controlled."

State laws
as rules of
decision.

Section 721, Rev. Stat. U. S., provides that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." It has been generally held under this statute that decisions of State courts on questions of general jurisprudence are not binding upon the federal courts, but that modifications declared by a State constitution or statute will be given full effect in the federal courts sitting within that State. In line with this principle is the recognition of the validity of a State statute providing: "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or

⁸ (1876) 93 U. S. 174.

⁹ (1901) 181 U. S. 92.

property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into," so far as it concerns liability for injuries happening within the State in a matter of interstate commerce. In sustaining the statute, the court, speaking through Mr. Justice Gray, said: "The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the State in which the cause of action arises. But the law to be applied is none the less the law of the State; and may be changed by its legislature, except so far as restrained by the constitution of the State or by the Constitution or laws of the United States."¹ The federal courts apply the principles of the common law as adopted by the several States each for itself as its local law, and "a determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascer-

¹ Chicago, etc., R. Co. v. Solan, (1898) 169 U. S. 133.

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I.

Application
of common-
law princi-
ples by
State courts
in inter-
state trans-
actions.

tain and declare the law according to their own judgment.”²

And in the State courts the principles of the common law may be applied in cases arising upon interstate transactions. The case of *Western Union Tel. Co. v. Call Pub. Co.*³ was an action begun in a State court to recover sums alleged to have been wrongfully charged and collected in making unjust discrimination against the plaintiff in the transmission of press dispatches. The case was submitted to the jury upon the propositions that where there is dissimilarity in the services rendered a difference in charges is proper, and that no recovery can be had unless it is shown, not merely that there is a difference in the charges, but that that difference is so great as, under dissimilar conditions of service, to show an unjust discrimination, and that the recovery must be limited to the amount of the unreasonable discrimination, and was affirmed by the Supreme Court of the State. In sustaining the State courts, the Supreme Court of the United States, Mr. Justice Brewer delivering the opinion, said that “no one can doubt the inherent justice of the rules thus laid down.” It was further said that the telegraph company “contends that there is no federal common law, and that such has been the ruling of this court; there was no federal statute law at the time applicable to this case, and as the matter is interstate commerce, wholly removed from State jurisdiction, the conclusion is reached that there is no controlling law, and the question of rates is left entirely to the judgment or whim of the telegraph

² *Per* Mr. Justice Matthews, in *Smith v. Alabama*, (1888) 124 U. S. 465.

³ (1901) 181 U. S. 92.

company. . . . We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment.”

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Congress may make provision as to contracts for interstate carriage, permitting a carrier to limit its liability to a particular sum in consideration of lower rates for transportation. But in the absence of congressional legislation on the subject, a State may require a common carrier, although in the execution of a contract for interstate carriage, to be liable for the whole loss resulting from negligence in the discharge of its duties, notwithstanding a contract may have been entered into between the carrier and the shipper limiting the carrier's liability. It makes no difference as to the power of the State in this respect whether the principle is enacted into a statute,⁴ or results from the rules of law enforced in the State courts, so far as the principle may be applied in trials in the State courts.⁵

Control of
contracts
limiting
liability.

JUDICIAL DEFINITIONS OF THE TERM COMMERCE.

The Constitution gives no definition of the word “commerce.” In determining the extent of the power granted to Congress “to regulate commerce,” it is necessary to understand what the word means in this connection, or, at least, to know to what sub-

No defini-
tion in the
Constitu-
tion.

⁴ Chicago, etc., R. Co. v. Solan, (1898) 169 U. S. 133. See also Peirce v. Van Dusen, (1897) 78 Fed. Rep. 693; Ohio, etc., R. Co. v. Tabor, (1895) 98 Ky. 503; Galveston, etc., R. Co. v. Fales, (1903) 33 Tex. Civ. App. 457; Pittman v. Pacific Express Co., (1900) 24 Tex. Civ. App. 595.

⁵ Pennsylvania R. Co. v. Hughes, (1903) 191 U. S. 477.

See, in this connection, Richmond, etc., R. Co. v. R. A. Patterson Tobacco Co., (1898) 169 U. S. 311, discussed *infra*, p. 162.

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jects and conditions the word has up to the present time been recognized by the courts as applicable. The very nature of the grant may be said to forbid an attempt at exact and comprehensive definition, or at any rate the judicial definitions have been in the nature of definitions by inclusion and exclusion in the exercise of the duty of the courts to determine the validity or invalidity of federal and State legislation.

Judicial
definitions
of inclu-
sion.

It has been said that the word "commerce" is a term of the largest import.⁶ It includes traffic by the purchase, sale, and exchange of commodities,⁷ and the transportation of persons and property by land and water.⁸ Navigation is also included as an element of commerce, as one of the means of interstate intercourse, and the principal means by which foreign intercourse is effected.⁹ Except in the case of the transportation of persons, there was and could be little controversy in the adoption of these definitions.

From the earliest case, construing this clause of

⁶ *Welton v. Missouri*, (1875) 91 U. S. 275. "We know from the cases decided in this court that it is a term of very large significance." *Hopkins v. U. S.*, (1898) 171 U. S. 578.

⁷ *Addyston Pipe, etc., Co. v. U. S.*, (1899) 175 U. S. 211; *Passenger Cases*, (1849) 7 How. (U. S.) 283.

⁸ *Chicago, etc., R. Co. v. Fuller*, (1873) 17 Wall. (U. S.) 560; *State Freight Tax Case*, (1872) 15 Wall. (U. S.) 232; *Addyston Pipe, etc., Co. v. U. S.*, (1899) 175 U. S. 211.

⁹ "Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." *Hanley v. Kansas City Southern R. Co.*, (1903) 187 U. S. 617.

⁹ *State Tonnage Tax Cases*, (1870) 12 Wall. (U. S.) 204; *Passenger Cases*, (1849) 7 How. (U. S.) 283; *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 196; *Henderson v. New York*, (1875) 92 U. S. 259; *Gilman v. Philadelphia*, (1865) 3 Wall. (U. S.) 713.

the Constitution, decided by the Supreme Court of the United States, that of *Gibbons v. Ogden*,¹ to the recent *Lottery Case*,² and the case of *Northern Securities Co. v. U. S.*,³ the definition that it consists of every species of commercial intercourse has been repeatedly recognized,⁴ and the question upon which the judges have been divided has been the application of this definition. The results might justify more than a mere impression that it includes intercourse without any qualifying adjective.

In the *Gibbons v. Ogden* case, *supra*, which is examined as to the particular holding in another part of this work,⁵ Marshall, C. J., said: "The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." The great chief

Chief
Justice
Marshall's
definitions.

¹ (1824) 9 Wheat. (U. S.) 1.

² (1903) 188 U. S. 321.

³ (1904) 193 U. S. 197.

⁴ *Pensacola Tel. Co. v. Western Union Tel. Co.*, (1877) 96 U. S. 1; *State Tonnage Tax Cases*, (1870) 12 Wall. (U. S.) 204; *Passenger Cases*, (1849) 7 How. (U. S.) 283; *Henderson v. New York*, (1875) 92 U. S. 259; *Hopkins v. U. S.*, (1898) 171 U. S. 578.

⁵ See *infra*, p. 199.

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I.Definitions
stated in
the Lottery
Case.

justice later, in *Brown v. Maryland*,⁶ said that the power of Congress to regulate commerce is complete in itself and acknowledges no limitations other than are prescribed by the Constitution; also that "commerce is intercourse; one of its most ordinary ingredients is traffic." In the *Lottery Case* Mr. Justice Harlan said: "What is the import of the word 'commerce' as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified also constitute commerce among the States?" And he further said that the cases therein reviewed show "that commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph." The remarks of Chief Justice Fuller, in the dissenting opinion, in which three other justices concurred, give an idea of the importance of this case as recognizing the power of Congress to legislate upon subjects having relation

⁶ (1827) 12 Wheat. (U. S.) 419.

"The legal definition of the term, as given by this court in *Mobile County v. Kimball*, (1880) 102 U. S. 691, is as follows: 'Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.'" *Kidd v. Pearson*, (1888) 128 U. S. 1.

to commerce in the nature of interstate intercourse. He said: "When Chief Justice Marshall said that commerce embraced intercourse, he added, commercial intercourse, and this was necessarily so, since, as Chief Justice Taney pointed out, if intercourse were a word of larger meaning than the word commerce, it could not be substituted for the word of more limited meaning contained in the Constitution. Is the carriage of lottery tickets from one State to another commercial intercourse? The lottery ticket purports to create contractual relations and to furnish the means of enforcing a contract right. . . . If a lottery ticket is not an article of commerce, how can it become so when placed in an envelope or box or other covering, and transported by an express company? To say that the mere carrying of an article which is not an article of commerce in and of itself nevertheless becomes such the moment it is to be transported from one State to another, is to transform a noncommercial article into a commercial one simply because it is transported. I cannot conceive that any such result can properly follow. It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place, and of interstate commerce if from State to State."

RELATIVE AUTHORITY OF CONGRESS AND THE COURTS TO DEFINE THE GRANTS OF POWER.

It has been said that the very nature of the grant of power to Congress forbids any attempt at exact or comprehensive definition. Any definition, whether statutory or judicial, must necessarily be merely inclusive or exclusive. But the inquiry, who has the power primarily to define the term commerce,

The question and proposition stated.

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I.**

is the first question in the search for a basic principle of constitutional interpretation, and it suggests the proposition that to the legislative department belongs the power to define the substantive grants of power contained in the Constitution, except, perhaps, those powers which are granted to the executive department, and that to the judicial department is confided the power to determine whether the limitations and prohibitions prescribed by the Constitution have been duly observed. It is our purpose here to examine this question in the light of some other grants of power contained in the Constitution, in order to obtain aid therefrom in the attempt to ascertain the limit, if any, to the authority of Congress, under the grant of power to regulate commerce, to define the term.

Under the
taxation
clauses.

Congress is, by Article I, section 8, given "power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;" and section 2 of the same article provides that "direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers." It must be within the power of the courts to define what is meant by "direct" taxes in order to determine in any given case whether the constitutional requirement of apportionment has been observed in the levy of such a tax, and whether in the levy of duties, imposts, and excises the prescribed rule of uniformity, which is a rule of limitation, has been obeyed. But otherwise the right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution,

it is within the authority conferred on Congress to select the objects upon which an excise should be laid,⁷ only further limited by the consideration that the operations of a State government cannot be considered the proper subject of federal taxation, as a State tax certificate,⁸ State process,⁹ receipts from municipal bonds,¹ or the salary of a State officer.²

The guaranty to every State of a republican form of government is given in terms to "the United States" in section 4 of Article IV, and it would have seemed to be a judicial question to determine what is the established government in a State and whether it conforms to the requirements of being republican in form. But in *Luther v. Borden*,³ Chief Justice Taney said: "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they

Guaranty
to States of
republican
form of
government.

⁷ *McCray v. U. S.*, (1904) 195 U. S. 27.

⁸ *Barden v. Columbia County*, (1873) 33 Wis. 445.

⁹ *Smith v. Short*, (1867) 40 Ala. 385; *Tucker v. Potter*, (1868), 35 Conn. 43; *Craig v. Dimock*, (1868) 47 Ill. 308; *Warren v. Paul*, (1864) 22 Ind. 276; *Fifield v. Close*, (1867) 15 Mich. 505; *Coppernoll v. Ketcham*, (1867) 56 Barb. (N. Y.) 111; *Dawson v. McCarty*, (1899) 21 Wash. 314; *Jones v. Keep*, (1865) 19 Wis. 369.

Attorney-General Stanbery advised the Secretary of the Treasury that the stamp duty on writs and other legal papers imposed by the Internal Revenue Act of June 30, 1864, was constitutional. See *Stamp Tax on Writs*, (1866) 12 Op. Atty.-Gen. 23.

¹ *Pollock v. Farmers' L. & T. Co.*, (1895) 158 U. S. 601.

² *Collector v. Day*, (1870) 11 Wall. (U. S.) 113.

³ (1849) 7 How. (U. S.) 1.

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are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.”⁴

Power of Congress to Define a Case in Equity.

Jurisdiction
in all cases
“in law
and
equity.”

The grant of judicial power in Article III, section 2, also presents questions as to the power of Congress to determine to what extent and in what manner the powers granted shall be exercised. The section provides that the judicial power shall extend, in part, “to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.” Although the power of Congress to define a case in equity, and declare what is or what is not a case of equitable cognizance, has not perhaps been clearly determined, there is room for discussion and the exercise of individual judgment until the question is more clearly and authoritatively decided.

Application
of section
914, Rev.
Stat. U. S.

Many cases declare that the federal courts cannot permit the blending together in one suit of legal and equitable remedies or the setting up of equitable defenses to actions at law. In almost every case it will be found that the question has arisen on the application of section 914 of the Revised Statutes of the United States. That section provides: “The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, plead-

⁴ See also *Texas v. White*, (1868) 7 Wall. (U. S.) 700.

ings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.”⁵ It will be observed that the statute in terms excludes equity causes, and aside from that consideration, inasmuch as the distinction between cases at law and in equity is so clearly recognized by the Constitution, it could not be supposed that Congress intended that the federal courts should follow the State statutes abolishing the distinction between legal and equitable remedies, in the absence of express federal statutory authority, even if it be admitted that Congress has the right to do so. But it is another matter to say that Congress cannot declare what is a case in equity.

In *Irvine v. Marshall*,⁶ Mr. Justice Daniel, speaking for the court, said: “With regard to the fourth objection, of a want of jurisdiction in the courts of the United States, in the absence of express statutory provisions, to recognize and enforce a resulting trust like that presented by the present case, it is a sufficient response to say that the jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily implied, by and under the Constitution and laws of the United States.” The expression “in the absence of express statutory provisions” should be particularly noticed, as also “by and under the Constitution *and laws* of the United States,” to which combination of constitutional and statutory authority the courts invariably refer as the source of their authority. And in a

Judicial
remarks.

⁵ 4 Fed. Stat. Annot. 563.

⁶ (1857) 20 How. (U. S.) 558.

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Circuit Court of Appeals case,⁷ in which Mr. Justice Brewer, as circuit justice, was one of the judges, the court said: "Congress undoubtedly had the power to define what should be a case in equity by declaring what the common law was which drew the line between the courts of law and equity, and there can be no doubt that, when so declared, that declaration was obligatory upon the federal courts by superadding the authority of the legislative department of the government to that of the common law, so as not to leave the line of separation discretionary with the judges."⁸

Power of territorial legislature to ignore distinction.

A case apparently in direct opposition to the principle suggested is that of *Dunphy v. Klein-smith*,⁹ which held, under the organic law of a Territory, that the territorial legislature had no power to pass any law in contravention of the Constitution of the United States, or which should deprive the courts of the Territory of chancery as well as common-law jurisdiction. Though required by express

⁷ *Smith v. American Nat. Bank*, (1898) 89 Fed. Rep. 832.

⁸ "Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them to each particular case as they may find justly applicable thereto. These principles may make part of the law of a State, or they may have been modified by its legislation or usages, or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several States. But in all the States the equity law, recognized by the Constitution and by Acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court." *Per* Mr. Justice Curtis, in *Neves v. Scott*, (1851) 13 How. (U. S.) 268.

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property." *Per* Mr. Justice Gray, in *In re Sawyer*, (1888) 124 U. S. 200.

⁹ (1870) 11 Wall. (U. S.) 610.

territorial statute, conducting the trial of a case clearly of chancery jurisdiction as a trial at common law, and rendering a decree on the verdict precisely as a judgment is rendered on a verdict at common law, was held to be error. "The case," said Mr. Justice Bradley, "being a chancery case, and being instituted as such, should have been tried as a chancery case by the modes of proceeding known to courts of equity. In those courts the judge or chancellor is responsible for the decree. If he refers any questions of fact to a jury, as he may do by a feigned issue, he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as the result of his own judgment, aided, it is true, by the finding of the jury." This case, however, passing merely upon the power of a territorial legislature, cannot be considered as conclusive authority on the question whether Congress has power to define the line between the courts of law and of equity.^{9*}

^{9*} The theory of the case of *Dunphy v. Kleinsmith*, *supra*, in opposition to the principle suggested, is weakened by the subsequent case of *Hornbuckle v. Toombs*, (1873) 18 Wall. (U. S.) 648, wherein the court, holding that the practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves, and speaking through Mr. Justice Bradley, said: "The only provision is, that the courts named shall possess both jurisdictions. If the two jurisdictions had never been exercised in any other way than by distinct modes of proceeding, there would be ground for supposing that Congress intended them to be exercised in that way. But it is well known that in many States of the Union the two jurisdictions are commingled in one form of action. And there is nothing in the nature of things to prevent such a mode of proceeding. Even in the Circuit and District Courts of the United States the same court is invested with the two jurisdictions, having a law side and an equity side; and the

Chapter
I.

Preservation of
right of
trial by
jury.

But this subject is to be considered in the light of the clause of the Seventh Amendment providing that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." In *Ellis v. Davis*,¹ Mr. Justice Matthews, delivering the opinion of the court, said: "It has often been decided by this court that the terms 'law' and 'equity' as used in the Constitution, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace . . . new forms of remedies to be administered in the courts of the United States, according to the nature of the case, so as to save to suitors the right of trial by jury in cases in which they are entitled to it, according to the course and analogy of the common law." In *Root v. Lake Shore, etc., R. Co.*,² the same learned justice said: "It is the settled doctrine of this court that this distinction of jurisdiction, between law and

enforced separation of the two remedies, legal and equitable, in reference to the same subject-matter of controversy, sometimes leads to interesting exhibitions of the power of mere form to retard the administration of justice. In most cases it is difficult to see any good reason why an equitable right should not be enforced or an equitable remedy administered in the same proceeding by which the legal rights of the parties are adjudicated. Be this, however, as it may, a consolidation of the two jurisdictions exists in many of the States, and must be considered as having been well known to Congress; and when the latter body, in the organic act, simply declares that certain territorial courts shall possess both jurisdictions, without prescribing how they shall be exercised, the passage by the territorial assembly of a code of practice which unites them in one form of action cannot be deemed repugnant to such organic act."

¹ (1883) 109 U. S. 485.

² (1881) 105 U. S. 189.

equity, is constitutional, to the extent to which the Seventh Amendment forbids any infringement of the right of trial by jury, as fixed by the common law.”

From all this it may not unreasonably be inferred that Congress has the power to transfer causes commonly understood to be equitable in their nature to the law side of the courts, but that its power to give to courts of equity jurisdiction of so-called actions at law is limited by the necessity to preserve the constitutional right of trial by jury “in suits at common law.”

Conclusion
stated.

Power of Congress to Define the Admiralty Jurisdiction.

As further illustrating the power of Congress to determine the scope of constitutional grants, its power to determine the limits of the exercise of admiralty jurisdiction, under the clause of Article III, section 2, providing that the judicial power shall extend “to all cases of admiralty and maritime jurisdiction,” may also be considered. As to the subjects of that jurisdiction, there can now be no question of the power of the federal legislature to grant to or withhold from the federal courts jurisdiction in admiralty of any subject that has any relation to maritime affairs. It was said by Mr. Justice Bradley, in *In re Garnett*:³ “The Act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which

Subjects of
admiralty
jurisdiction.

³ (1891) 141 U. S. 1.

Chapter
I.

limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.”

Territorial
jurisdiction.

But the power of Congress to determine the territorial jurisdiction in admiralty is not so clear. For over fifty years after the adoption of the Constitution and the enactment of the Act of Congress⁴ giving to the District Courts of the United States general jurisdiction in admiralty, the courts, following the English doctrine, declared that admiralty jurisdiction in cases purely dependent upon the locality of the act done was limited to the sea and to tide waters as far as the tide flows.⁵

Statutory
departure
from Eng-
lish doc-
trine.

In 1845 Congress passed an Act⁶ providing “That the District Courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States.”

Under this Act the case of *The Propeller Genesee*

⁴ Act of September 24, 1789, c. 20, brought forward into section 563, Rev. Stat. U. S., 4 Fed. Stat. Annot. 220.

⁵ See *The Steamboat Thomas Jefferson*, (1825) 10 Wheat. (U. S.) 428; *The Steamboat Orleans v. Phœbus*, (1837) 11 Pet. (U. S.) 175.

⁶ Act of February 26, 1845, 5 Stat. at L. 726, c. 20.

*Chief v. Fitzhugh*⁷ was brought by filing a libel for the condemnation of a vessel and the payment of damages on account of a collision which occurred on Lake Ontario. In holding the Act of Congress to be a valid enactment, the court, after restating the territorial admiralty jurisdiction according to the English doctrine, said, through Chief Justice Taney: "The nature of the questions concerning the extent of the admiralty jurisdiction, which have arisen in this court, were not calculated to call its attention particularly to the one we are now considering. The point in dispute has generally been, whether the jurisdiction was not as limited in the United States as it was in England at the time the Constitution was adopted. And if it was so limited, then it did not extend to contracts for maritime services when made on land; nor to torts and collisions on a tide-water river, if they took place in the body of a country. The attention of the court, therefore, in former cases, has been generally strongly attracted to that question, and never, we believe, until recently, drawn to the one we are now discussing, except in the case of *The Thomas Jefferson*, afterwards followed in *The Steamboat Orleans v. Phœbus*, as already mentioned. For, with this exception, the cases always arose on contracts for services on tide-water, or were upon libels for collisions or other torts committed within the ebb and flow of the tide. There was therefore no necessity for inquiring whether the jurisdiction extended further in a public navigable water. And following the English definition, tide was assumed and spoken of as its limit; although that particular question was not before the court. . . . It is evident that a definition that

⁷ (1851) 12 How. (U. S.) 443.

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I.

would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." This new doctrine was afterwards followed in all admiralty causes arising on any of the navigable waters of the United States.

Statute con-
sidered
declaratory.

But the difficulty now encountered, on the question of the power of the legislature to define the territorial jurisdiction, is that presented by the remarks of Nelson, J., in *The Eagle*,⁸ affirming the general admiralty jurisdiction over all the navigable waters of the United States, wherein he said: "One question, and a very important one, is, whether, since the decision of *The Genesee Chief*, which opens the lakes and the waters connecting them to the general jurisdiction of the District Courts in admiralty, they can entertain this jurisdiction in cases outside of that conferred by this Act? If the affirmative of this question should be sustained, although the system would be disjointed and incongruous, yet it would, in its result, remedy most of the difficulties and inconveniences now existing. But the opinions of the judges of this court, as expressed in several cases, though the question has never been directly before the court for decision, are, that the Act should be regarded as restrictive of the general jurisdiction

⁸ (1868) 8 Wall. (U. S.) 15.

of these courts. This was the opinion expressed by the Chief Justice in the case of *The Genesee Chief*, and has been followed by other justices in this court, who have had occasion to express any opinion in the subject. The history and operation of this Act of 1845 are peculiar. It is 'an Act extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same.' At the time it was enacted it had the effect expressed and intended, and so continued for some seven years, when the case of *The Genesee Chief* was decided. From that time its effect ceased as an enabling act; and has been no longer regarded as such. It is no longer considered by this court as conferring any jurisdiction in admiralty upon the District Courts over the lakes, or the waters connecting them. That is regarded as having been conferred by the grant of general admiralty jurisdiction by the ninth section of the Act of 1789 to these courts." From this it will be seen that the English doctrine was followed by the courts until the Act of 1845, which may be considered in the nature of a legislative definition of the constitutional grant of jurisdiction, followed by judicial recognition and extension of the definition and construction of the constitutional grant extending the jurisdiction to all the navigable waters of the United States.

It should be noticed, however, that this assumption of jurisdiction over all navigable waters by judicial construction of the constitutional grant is under the statute of 1789, conferring on the District Courts general admiralty jurisdiction, and has not foreclosed consideration of the power of Congress to limit by express statute this territorial jurisdic-

Judicial assumption of jurisdiction under a general statute.

Chapter
I.

tion of the federal courts in admiralty to particular waters. Whether the jurisdiction in admiralty extends to all the navigable waters of the United States, conforming in this respect rather to the civil than the common law, as is now held under the general statute, or whether the jurisdiction shall be limited to the high seas and to tide waters, would seem to be a matter of legislative discretion, but as it exists now, the general statute leaves the territorial extent of the jurisdiction a matter for judicial determination.

Legislation necessary to the exercise of judicial power.

We are not concerned here with the expediency or the probability of the exercise of this supposed power by Congress, but the abstract question of the existence of the power is of interest, as furnishing illustration of the wide powers of definition which Congress possesses. In *U. S. v. Hudson*,⁹ Mr. Justice Johnson said that "of all the courts which the United States may, under their general powers, constitute, one only — the Supreme Court — possesses jurisdiction derived immediately from the Constitution and of which the legislative power cannot deprive it," and the remark has been quoted with approval by Chief Justice Fuller.¹

Power of Congress to Define the Term Commerce.

What is meant by legislative definition.

When the power of Congress to define the term "commerce" is referred to, it is not of course meant that any attempt would be made to give a statutory definition as such to the word, but that when Congress legislates on a particular subject under the grant of power to regulate commerce, it thereby, in

⁹ (1812) 7 Cranch (U. S.) 32.

¹ *Stevenson v. Fain*, (1904) 195 U. S. 165.

effect, gives a partial definition to the term as including the particular subject-matter of the statute. This authority to define may be discussed in view of the wide power of definition which Congress seems to possess, as appears from the foregoing canvass of several of the constitutional grants, and also from an examination of a few suggestive cases which have arisen under the commerce clause.

Unlike many of the words and phrases used in the Constitution, the term "commerce" has no juridical significance or meaning. The words due process of law, trial by jury, law and equity, admiralty and maritime, habeas corpus, bill of attainder, *ex post facto*, duty of tonnage, and many other terms and expressions contained in that instrument, had well-understood places and meaning in the system of jurisprudence with which the framers of the Constitution were familiar.

The term without juridical significance.

It can never be questioned that to determine the operation of the constitutional limitations, and in doing so to define the terms used, is necessarily one of the functions of the courts. Included in this power, so far as relates to the commerce clause, is the right and duty of the courts to see that federal legislation operates only on that commerce which is "with foreign nations, and among the several States, and with the Indian tribes." It is also the province of the courts to see that, in legislating upon this branch of commerce, none of the limitations or prohibitions of the Constitution, or its amendments, specially applicable to the national government, have been infringed. And as a last and ultimate manifestation of judicial power, the courts may decide whether the subject of legislation by Congress has any relation to commerce.

Judicial power to define the limitations.

Chapter
I.

Attitude of
federal
courts to
State legis-
lation.

But to State legislation, the federal courts sustain a somewhat different relation. The grant of power to Congress over interstate and foreign commerce is a limitation on the powers of the States to legislate with respect thereto, and the duty rests upon the courts to see that such commerce is kept free from burdensome State regulation; and in so doing it occasionally becomes necessary to define the term, and this the courts freely do. It will be found, perhaps, that most of the judicial definitions which have been given have been occasioned by the necessity of deciding whether particular State statutes had or had not reference to the subject of commerce.

Judicial in-
quiry not
excluded by
federal
legislative
definition.

“ If a particular article is not the subject of commerce, the determination of Congress that it is cannot be so conclusive as to exclude judicial inquiry,” said Chief Justice Fuller, in his dissenting opinion in the *Lottery Case*,² but the decision of that case, holding that a lottery ticket is a subject of commerce, shows how nearly the court feels bound by a federal statutory definition.

It is instructive to compare this remark with an utterance of the same learned chief justice in a previous case, which has apparently, but not in reality, a contrary significance. In *Leisy v. Hardin*,³ it was held that a State statute prohibiting the sale of imported liquors was a burden upon commerce, and in the course of the opinion, in the part having special reference to the recognition of intoxicating liquor by federal legislation as a proper subject of commerce, the chief justice said: “ Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot

² (1903) 188 U. S. 321.

³ (1890) 135 U. S. 100.

hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character."

If it could be supposed that Congress would pass a law on a subject which, under any accepted definition or meaning of the word, had no relation to commerce, it would undoubtedly be the duty of the courts to declare it invalid, if it depended for its validity upon the power given to Congress to regulate commerce. But that the subject-matter of an Act of Congress would have to reach this stage of certainty of nonrelationship to commerce to require such an extreme exercise of judicial power, is evident from the observation of Mr. Justice Miller, in the *Trade-Mark Cases*,⁴ that "the question, therefore, whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided. We adopt this course because when this court is called on in the course of the administration of the law to consider whether an Act of Congress, or of any other department of the government, is within the constitutional authority of that department, a due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty."

Weight
given to
legislative
definition.

⁴ (1879) 100 U. S. 82.

CHAPTER II.

THE GENERAL POWER OF CONGRESS.

THE POWER OF CONGRESS OVER INTERSTATE AND FOREIGN COMMERCE GENERALLY.

Chapter II.

Plenary power of Congress.

THE power of Congress over interstate and foreign commerce is coextensive with the subject.¹

Its power over that commerce is as full and complete as is the power of any State over its domestic commerce.² Chief Justice Marshall said: "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."³ Though the power does not comprehend the purely internal domestic commerce of a State,⁴ it reaches and may be exercised within the territorial jurisdiction of the several States; it is not embarrassed by State lines.⁵

¹ *Kidd v. Pearson*, (1888) 128 U. S. 1.

² *Northern Securities Co. v. U. S.*, (1904) 193 U. S. 197.

³ *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 1.

⁴ *Addyston Pipe, etc., Co. v. U. S.*, (1899) 175 U. S. 211; *Trade-Mark Cases*, (1879) 100 U. S. 82.

⁵ *Guy v. Baltimore*, (1879) 100 U. S. 434; *Pensacola Tel. Co. v. Western Union Tel. Co.*, (1877) 96 U. S. 1.

Chapter
II.

Carried on
by corpora-
tions or in-
dividuals.

Commerce, whether carried on by individuals or corporations, is equally free from State regulation or burden. In the case of *Paul v. Virginia*,⁶ it was urged in the argument that the power conferred on Congress "to regulate commerce" does not exclude the commerce carried on by corporations, and the court, through Mr. Justice Field, said: "It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburg Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations." The right, though evidently never seriously questioned, was incidentally referred to in the cases of the *Gloucester Ferry Co. v. Pennsylvania*,⁷ and *Crutcher v. Kentucky*,⁸ and in the latter case the court said that the accession of mere corporate facilities, as a matter of convenience in carrying on their

⁶ (1868) 8 Wall. (U. S.) 168.

⁷ (1885) 114 U. S. 196.

⁸ (1891) 141 U. S. 47.

Chapter
II.

business, cannot have the effect of depriving citizens of the United States of such right, unless Congress should see fit to interpose some contrary regulation on the subject.

Prescribe
rules by
which
commerce
governed.

Congress may prescribe the rules by which commerce shall be governed. Notable instances of this are the rules promulgated in conformity with which navigation must be carried on; and with regard to certain commercial transactions and contracts Congress has declared the rule of free competition.⁹ The application of these rules has been noticed in different parts of this work.

Northern
Securities
case.

In this connection, however, the case of *Northern Securities Co. v. U. S.*¹ may be especially noticed. The corporation was proceeded against by a bill in equity to enforce the provisions of the Sherman Anti-Trust Law. It was organized by the stockholders of two transcontinental and competing railroad companies as a holding corporation to take the shares held by stockholders of the constituent companies in exchange for its own shares upon an agreed basis of value, and, pursuant to that plan, it became the majority owner of the stock of the competing companies. Such an arrangement was held to be an illegal combination in restraint of interstate commerce, within the prohibition of the law, and the holding corporation was restrained from

⁹ The Sherman Act, commonly called the Anti-Trust Act, is the Act of July 2, 1890, c. 647, 7 Fed. Stat. Annot. 336. This statute has been construed in many cases, a few of which have passed upon the power of Congress to adopt such a rule as applying to the particular contracts. As these matters have been referred to under the different subjects of regulation, the reader should consult the index, wherein the questions raised under the statute have been grouped for convenience of reference under the division *Anti-Trust Law*.

¹ (1904) 193 U. S. 197.

voting such stock or exercising any control over the constituent companies. The case was one of far-reaching importance concerning the extent of the power of Congress to regulate interstate commerce. Several of the suggestions of Mr. Justice Harlan, who wrote the opinion of the court, are made the basis of observations in other parts of this work,² but his summary of the propositions, deducible from the decisions of the court in previous cases arising under the statute, may here be noted. Those propositions, in the language of the learned justice, are: . . .

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy or monopoly upon such trade or commerce;

Application
of Sherman
Anti-Trust
Law.

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act; . . .

That Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

That every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act;

That the natural effect of competition is to in-

² See especially *infra*, p. 175.

Chapter
II.

crease commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce;

That to vitiate a combination, such as the Act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guaranty of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce; and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.³

SUBJECT TO CONSTITUTIONAL LIMITATIONS.

Upon
exercise of
eminent
domain
power.

While this power is complete in itself, it is limited, as are all the powers of the national government, by the prohibitions and limitations of the Constitution and its amendments. The power "acknowledges no limitations, other than are pre-

³ The propositions omitted from the quotation of the summary have especial reference to the application of the Sherman Act to the interstate business of manufacturers, and are stated in that connection. See *infra*, p. 114.

scribed in the Constitution.”⁴ If, in exercising control of commerce, Congress deems it necessary to take private property, then it must proceed subject to the limitations imposed by the Fifth Amendment, and can take only on payment of just compensation. The exercise of the power of eminent domain, as an aid to the power to regulate commerce, is discussed hereafter.⁵

Taxation on Exports from a State.

A specific prohibition on the power of Congress is found in the clause of Article I, section 9, of the Constitution declaring that “no tax shall be laid on articles exported from any State.” It may perhaps be said that this clause is a limitation on the taxing power and not on the power to regulate commerce. With its operation as a limitation on the taxing power, we have no concern. It is proper here to say, however, that the word “export” applies only to goods exported to a foreign country, and that the prohibition has no reference to general taxes laid on all property alike and not levied on goods in course of exportation, nor because of their intended exportation;⁶ and the right of Congress to tax goods has been affirmed even in the case of goods manufactured under contract for exportation, and in fact duly exported.⁷

As limiting
power to
regulate
commerce.

Preference to Ports of One State.

Another specific prohibition is the clause contained in Article I, section 9, declaring that “no

⁴ *Per* Chief Justice Marshall, in *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 1.

⁵ See *infra*, p. 59.

⁶ *Turpin v. Burgess*, (1886) 117 U. S. 504.

⁷ *Cornell v. Coyne*, (1904) 192 U. S. 418.

Chapter
II.Restriction
upon fed-
eral gov-
ernment.

preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.” This clause is a restriction upon the powers of the federal government, and does not affect the States in the regulation of their domestic affairs.⁸ The little that has been said, judicially, respecting this clause will be found discussed in the part of this work relating to the power of Congress to regulate rates for interstate transportation,⁹ and respecting the effect of the action of Congress in permitting the several States to adopt pilotage regulations.¹

MAY ADOPT ANY APPROPRIATE MEANS.

By creation
or use of
corpora-
tions.

To carry out any scheme for the promotion or regulation of commerce, Congress may make use of any appropriate means. A corporate franchise may be granted directly by Congress,² or a corporation created by a State may be made use of as a fit instrumentality to accomplish the federal purpose.³

The Sherman Anti-Trust Act provides that “ the several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and re-

⁸ *Johnson v. Chicago, etc., Elevator Co.*, (1886) 119 U. S. 388; *Morgan's Steamship Co. v. Louisiana Board of Health*, (1886) 118 U. S. 455; *Munn v. Illinois*, (1876) 94 U. S. 113.

⁹ See *infra*, p. 176.

¹ See *infra*, p. 212.

² *Luxton v. North River Bridge Co.*, (1894) 153 U. S. 525; *California v. Central Pac. R. Co.*, (1888) 127 U. S. 1.

³ *Cherokee Nation v. Southern Kansas R. Co.*, (1890) 135 U. S. 641.

“The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent

strain violations of this Act.”⁴ Mr. Justice Peckham, speaking for the federal Supreme Court, said: “It is also argued that the United States have no standing in court to maintain this bill; that they have no pecuniary interest in the result of the litigation or in the question to be decided by the court. We think that the fourth section of the Act invests the government with full power and authority to bring such an action as this, and if the facts be proved, an injunction should issue. Congress having the control of interstate commerce, has also the duty of protecting it, and it is entirely competent for that body to give the remedy by injunction as more efficient than any other civil remedy.”⁵

Chapter
II.

Remedy by
injunction.

For the protection of commerce on the high seas Congress is given power, by a clause in Article I, section 8, of the Constitution, “to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.” But the power of Congress is not limited by that clause. Congress may punish all grades of offenses, committed on the high seas or on any waters, under its power to regulate commerce.⁶ That Congress has power to adopt and provide for the enforcement of

Enactment
of criminal
laws.

power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished.” *Per* Chief Justice Marshall, in *M'Culloch v. Maryland*, (1819) 4 Wheat. (U. S.) 316.

⁴ Act of July 2, 1890, c. 647, § 4, 7 Fed. Stat. Annot. 344.

⁵ *U. S. v. Trans-Missouri Freight Assoc.*, (1897) 166 U. S. 290. See also *In re Debs*, (1895) 158 U. S. 564.

⁶ *U. S. v. Coombs*, (1838) 12 Pet. (U. S.) 72; *Ex p. Byers*, (1887) 32 Fed. Rep. 404; Charge to Grand Jury, (1861) 2 Sprague (U. S.) 279, 30 Fed. Cas. No. 18,256; *U. S. v. Cole*, (1853) 5 McLean (U. S.) 513, 25 Fed. Cas. No. 14,832; *The Ulysses*, (1800) Brun. Col. Cas. (U. S.) 529, 24 Fed. Cas. No. 14330.

Chapter
II.

criminal laws, for the purpose of insuring compliance with regulations it may constitutionally prescribe, was stated by Mr. Justice Field, in *U. S. v. Fox*,⁷ wherein he said: "Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States. But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate."

WHAT CONSTITUTES THE POWER TO REGULATE.

The power to "regulate," contained in ordinary statutes and ordinances, may well be limited to the power to exercise some sort of control short of the power to prohibit, but the construction of such a term, as used in a constitution partitioning the powers of federal and State sovereignty, cannot be so simply determined. By reason of the grant of power to Congress to regulate interstate and foreign commerce, the States cannot adopt any regulations imposing a burden upon, much less prohibiting, such commerce. And if the power of Congress to regulate does not include in some measure the power to prohibit, there is an abeyance of a high governmental function without a constitutional prohibition.

Division of
sovereign
powers.

⁷ (1877) 95 U. S. 670.

By the adoption of the Constitution, with its grants of power to the national government, its limitations on the powers of the national and State governments, and its reservation to the States of all powers not conferred upon the national government, it cannot be, without specific prohibition, that any of the attributes of sovereignty could have been dropped or suspended.

Whether there is any difference in this respect between the power to prohibit foreign commerce and interstate commerce, it is settled that a federal statute which restrains the introduction of particular goods into the United States from foreign countries, from considerations of public policy, is within the power of Congress to regulate commerce with foreign nations, and that such a statute does not violate the due process clause of the Constitution.⁸

Goods from
foreign
countries.

We are not without authority, however, that the power to regulate interstate commerce does include, to some extent, the power to prohibit such commerce. Chief Justice Marshall early said that this power to regulate, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution,"⁹ and Mr. Justice Swayne said that for the purpose of exercising this power "Congress possesses all the powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament in England."¹

As a plenary
sovereign
power

⁸ *Buttfield v. Stranahan*, (1904) 192 U. S. 470, holding the Act of Congress of March 2, 1897, c. 358, 3 Fed. Stat. Annot. 138, entitled "An Act to prevent the importation of impure and unwholesome tea," to be valid.

⁹ *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 1.

¹ *Gilman v. Philadelphia*, (1865) 3 Wall. (U. S.) 713.

Chapter
II.Statutory
illustrations
of prohibi-
tion.

The Act of Congress of August 8, 1890, known as the Wilson Act, subjecting intoxicating liquors while in original packages to the operation of the laws of the State enacted in the exercise of its police powers, is an instance of federal prohibitive legislation in a modified form.² The Sherman Anti-Trust Act³ is also an illustration of the proposition that regulation may take the form of prohibition. The statute prescribes that free competition shall be the rule by which interstate commerce shall be governed. To accomplish that object, Congress declared certain contracts to be illegal, and, in effect, prohibited the doing of certain things, and its prohibitory clauses have been sustained as valid under the power of Congress to regulate interstate commerce.⁴

Prohibiting
transporta-
tion of lot-
tery tickets.

And in the *Lottery Case*⁵ it was held, not only that lottery tickets are subjects of commerce, but that, under its power to regulate commerce among the several States, Congress — subject to the limitations imposed by the Constitution upon the exercise of the powers granted — has plenary authority over interstate commerce, and may prohibit the carriage of such tickets from State to State. To the objection that if Congress may exclude lottery tickets from interstate commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity, or thing, of whatever kind

² The statute is fully discussed in another part of this work. See *infra*, p. 143.

³ Act of July 2, 1890, c. 647, 7 Fed. Stat. Annot. 336.

⁴ *Addyston Pipe, etc., Co. v. U. S.*, (1899) 175 U. S. 211; *U. S. v. Joint Traffic Assoc.*, (1898) 171 U. S. 505; *U. S. v. Trans-Missouri Freight Assoc.*, (1897) 166 U. S. 290.

⁵ (1903) 188 U. S. 321.

or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another, Mr. Justice Harlan said: "It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument."

The Power to Prohibit as an Exertion of a Police Power.

It is evident from what has been said that the question to what extent the power to regulate includes the power to prohibit interstate commerce cannot be adequately discussed without also considering the existence and scope of a power in the nature of a federal police.⁶

Chief Justice Fuller, writing the opinion of the court in *In re Rahrer*,⁷ said: "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the

State police powers considered exclusive.

⁶ See *infra*, p. 116.

⁷ (1891) 140 U. S. 545.



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States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive.” And Mr. Justice Brewer has observed: “It is undoubtedly true that the police power is not by the Constitution delegated to Congress. It may, therefore, under Article Ten of the Amendments, be regarded as reserved to the States respectively, or to the people.”⁸ In making these remarks, the learned justices must have had reference to what have hitherto been understood as strictly police or local regulations. But, inasmuch as even the State police power cannot be exerted so as to impede the operations of that commerce which is within the exclusive control of Congress, as is hereafter shown,⁹ some of the recent instances of the exercise of federal power indicate the existence of a power over interstate and foreign transactions which is similar to or parallel with that which is exerted by the States with respect to their domestic or local affairs and which is understood as the State police power.

Power plenary but subject to constitutional limitations.

There has been occasion, heretofore, to show that the power to regulate commerce, while plenary and complete in itself, is subject to all the limitations upon the federal power prescribed by the Constitution. It may well be doubted whether Congress has the absolute and unlimited power to prohibit the transportation, from one State to another, of articles respecting the use of which no question of public health, public morals, public safety, or public convenience can arise. Prohibiting absolutely the transportation of cotton from one State to another

⁸ In the dissenting opinion in *Austin v. Tennessee*, (1900) 179 U. S. 343.

⁹ See *infra*, p. 87.

would seem to result in depriving the cotton mill owners of Massachusetts, for instance, of their property rights in their business of manufacturing cotton goods, by preventing them from obtaining the necessary raw material, in violation of rights protected by the Fifth Amendment; and by arbitrarily prohibiting the transportation of wheat from one State to another, the wheat growers of the West would, in effect, be deprived of a valuable property right in their crops — the right to find an open market.

But the *Lottery Case*, *supra*, points to a coincidence of a federal power as respects interstate transactions, with that of the States as respects local transactions. In that case, the existence of any provision of the Constitution limiting the power of Congress to prohibit the interstate transportation of lottery tickets was debated, and it was found that the clause of the Fifth Amendment providing that no person shall be deprived of his liberty without due process of law — the liberty to contract — was not violated. Mr. Justice Harlan, writing the opinion of the court, said that, in determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it is sought to suppress cannot be overlooked, and added: "If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lot-

Nature of
traffic to be
considered.

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tery tickets from one State to another? ”¹ Instances of the exercise by Congress of such a power may be found in the food laws, and also in the statute enacted to prevent the carrying of obscene literature and articles intended for indecent and immoral use from one State or Territory into another State or Territory.²

Exercise of
combined
federal and
State
powers.

The combined powers of the federal and respective State governments may probably be exerted for the purpose of prohibiting absolutely the transportation into certain States of articles or commodities which are under the ban of public opinion in those States. If this can be effected, federal regard would be shown for the varying conditions of public opinion in the different States with respect to such matters as are generally confessed to be within the State police power and to be properly the subjects of regulation.³ The Act of August 8, 1890, operates to some extent in this direction. The statute declares that certain articles transported into any State shall be subject to the operation and effect of the laws of such State enacted in the exercise of its police powers. As a result of the strict construction given to the statute, as is hereafter shown,⁴ the

¹ Lottery Case, (1903) 188 U. S. 321.

² Act of February 8, 1897, c. 172, 29 Stat. L. 512, 5 Fed. Stat. Annot. 381.

The statute was held to be valid in *U. S. v. Popper*, (1899) 98 Fed. Rep. 423.

³ “If [Congress], which represents all the States, shall be of opinion that the use of any particular article is freighted with injury to public health, morals, or safety, it will absolutely prohibit interstate commerce therein, or if in its judgment . . . there is in certain localities such a feeling in reference to any article that commerce therein may wisely be regulated by the State, it will provide therefor.” *Per* Mr. Justice Brewer, in a dissenting opinion in *Austin v. Tennessee*, (1900) 179 U. S. 343.

⁴ See *infra*, p. 143.

sale of such articles in the original packages may be prohibited by a State, but the statute does not permit the prohibition of their importation from other States for the use of the importer. To give full effect to the operation of public opinion on such matters in the different States, it remains for Congress to withdraw the privilege of importing into a State, even for personal use, articles in which the laws of the State prohibit traffic. The adoption of some such policy, if sustained by the courts, would be one step further in the evolution of constitutional construction, and in the direction of national and State comity.

EXCLUSIVENESS OF THE POWER OF CONGRESS.

Since the adoption of the Constitution the main controversy has been over the line which divides the powers of the national and State governments. A general classification of national and State powers is contained in *Ex p. McNeil*.⁵ In that case Mr. Justice Swayne, speaking for the court, said: "In the complex system of polity which prevails in this country the powers of government may be divided into four classes. [First] Those which belong exclusively to the States. [Second] Those which belong exclusively to the national government. [Third] Those which may be exercised concurrently and independently by both. [Fourth] Those which may be exercised by the States, but only until Congress shall see fit to act upon the subject. The authority of the State then retires and lies in abeyance until the occasion for its exercise shall recur." These principles seem to have been early worked

Classification
of
national
and State
powers.

⁵ (1871) 13 Wall. (U. S.) 236.

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out though not formally stated before this case, so that it is perhaps hardly correct to say that the controversies have been over the line which divides national and State powers, but rather to which of these classes of powers any particular subject belongs.

Illustrations of classification.

As illustrating the principles stated, it may be said that to the first class belong all the powers not granted to the national government by the Federal Constitution, except such as are expressly prohibited to the States in that instrument; as belonging to the second class may be mentioned the grant of power to Congress to establish an uniform rule of naturalization; under the third class would come the power of taxation, which may be exercised generally by both the national and State governments, within certain limits; and the power given to Congress to establish uniform laws on the subject of bankruptcies has been so construed as well to illustrate the fourth class.

Classification of power to regulate commerce.

While the power to occupy the whole field of interstate and foreign commerce is in Congress,⁶ the whole power to regulate commerce cannot be placed in any one of these classes to the exclusion of the others, but the nature of the particular subject of commerce, and the consideration of its interstate and foreign or domestic character, would place it in either the first, second, or fourth class.

That the power given to Congress by this clause of the Constitution is not exclusive of all State legislation was early recognized though it was for a long time the subject of judicial conflict. The earliest clear and comprehensive statement of the rule as to the subjects upon which the State cannot legislate is

⁶ Lottery Case, (1903) 188 U. S. 321.

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power of
Congress
exclusive.

given in *Cooley v. Board of Wardens*,⁷ wherein the court, speaking through Mr. Justice Curtis, after saying that "the grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter; if they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States," further said: "The power to regulate commerce embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question [pilot laws], as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

A short time before it had been declared by Chief Justice Taney, in *License Cases*:⁸ "It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this court. But with every respect for the opinion of my brethren with whom I do not agree, it appears

Chief Justice Taney's early recognition of State power as to local matters.

⁷ (1851) 12 How. (U. S.) 299.⁸ (1847) 5 How. (U. S.) 504.

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to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress. Such evidently, I think, was the construction which the Constitution universally received at the time of its adoption, as appears from the legislation of Congress and of the several States; and a careful examination of the decisions of this court will show that, so far from sanctioning the opposite doctrine, they recognize and maintain the power of the States.”

Exclusive
as to trans-
portation,
and ex-
change of
commodi-
ties.

As the question whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated,⁹ the application of the principle to particular subjects is left to be dealt with hereafter under the detailed treatment of the subjects of regulation, but it may be here stated that it especially requires freedom from any impediment or restriction by State action,¹ and mainly includes, as subjects of national character which require uniformity of regulation, that part of commerce which consists in the interstate and foreign transportation of persons and

⁹ *Gilman v. Philadelphia*, (1865) 3 Wall. (U. S.) 713.

¹ *Walling v. Michigan*, (1886) 116 U. S. 446.

property,² and the purchase, sale, and exchange of commodities.³

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The inference from all this that the States may legislate on subjects which can be regulated by rules suited to the circumstances of different localities may be found in the discussion as to the power of the States generally to regulate matters pertaining to commerce.⁴

THE NATIONAL POWER OF EMINENT DOMAIN.

The power of eminent domain, as a substantive power, was not granted to the United States by the Federal Constitution, and consequently it is one of the powers reserved by the people, to be exercised by them through their several State governments, subject to such limitations as the people may prescribe in their State constitutions, and to those restrictions upon its exercise decreed by the Fourteenth Amendment of the Federal Constitution, that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Not a substantive power.

But though this power, because not granted, is not possessed by the federal government as a sub-

² Gloucester Ferry Co. v. Pennsylvania, (1885) 114 U. S. 196; Welton v. Missouri, (1875) 91 U. S. 275; State Freight Tax Case, (1872) 15 Wall. (U. S.) 232.

³ Mobile County v. Kimball, (1880) 102 U. S. 691.

The power is "certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestricted intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States coming or brought within its jurisdiction." Pittsburg, etc., Coal Co. v. Bates, (1895) 156 U. S. 577.

⁴ See *infra*, p. 76.

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A means for
carrying
out any
federal
purpose.

stantive and independent power, it nevertheless is a means by which the general government may accomplish the objects of the grants of power. When "needed for forts, armories, and arsenals, for navy yards and light houses, for custom houses, post-offices, and court-houses, and for other public uses,"⁵ lands may be acquired by the United States within the States either by direct purchase or by condemnation.⁶

How prop-
erty taken.

Under the power to regulate commerce, Congress may exercise this sovereign right. Property may be taken either directly by the government itself,⁷ or through the instrumentality of a corporation chartered by Act of Congress or by a State.⁸ Artificial as well as natural highways may be taken,¹ and an executive officer may be authorized to designate the particular property required.²

Consent of
State un-
necessary.

The consent of the State, within which the land is situated, is not necessary to its appropriation by the national government for national purposes. "The proper view," said Mr. Justice Strong, in

⁵ *Per* Mr. Justice Strong, in *Kohl v. U. S.*, (1875) 91 U. S. 367.

The cities of Washington and Georgetown were supplied with water conducted by aqueduct from the States of Maryland and Virginia, under the clause giving Congress exclusive legislation over the District of Columbia. See *U. S. v. Great Falls Mfg. Co.*, (1884) 112 U. S. 645.

⁶ Congress may exercise this power in a Territory as well as in a State, as was done by the Act of Congress, approved July 4, 1884, 23 Stat. L. 73, c. 179, entitled "An Act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company, and for other purposes." See *Cherokee Nation v. Southern Kansas R. Co.*, (1890) 135 U. S. 641.

⁷ *U. S. v. Jones*, (1883) 109 U. S. 513.

⁸ *Luxton v. North River Bridge Co.*, (1894) 153 U. S. 525; *Cherokee Nation v. Southern Kansas R. Co.*, (1890) 135 U. S. 641.

¹ *Monongahela Nav. Co. v. U. S.*, (1893) 148 U. S. 312.

² *Kohl v. U. S.*, (1875) 91 U. S. 367.

Kohl v. U. S.,³ “ of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.”⁴

Where the government, by the construction of public works, as in the case of the erection of a dam

Passing of
title.

³ (1875) 91 U. S. 367.

⁴ See Article I, § 8, providing that “the Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever, . . . over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.” See *Van Brocklin v. Tennessee*, (1886) 117 U. S. 151.

“Where . . . lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.” *Per Mr. Justice Field*, in *Ft. Leavenworth R. Co. v. Lowe*, (1885) 114 U. S. 525.

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for the purpose of improving the navigability of a river, destroys the value of land, so that it constitutes a taking of the property for public use, the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee, and when the amount awarded as compensation is paid, the title, with whatever rights may attach thereto, passes to the government.⁵

Duty to Make Just Compensation.

Condition
imposed by
Fifth
Amend-
ment.

Not only, however, is the power one to be exercised by the national government merely as a means by which the objects of the grants of power can be carried out, but, like all the powers granted to Congress by the Constitution and those possessed by Congress as incident to the particular sovereign powers thus created, it is subject to all the limitations imposed by such instrument. Among such limitations is the clause of the Fifth Amendment declaring: "Nor shall private property be taken for public use, without just compensation." It is, of course, not within the scope of this work to give anything like a comprehensive treatment of the powers, rights, and remedies arising out of the due observance of this restriction upon the national eminent domain power, but its application to proceedings authorized by Congress under its power to regulate commerce may be considered.⁶

⁵ U. S. v. Lynah, (1903) 188 U. S. 445.

See Clark v. U. S., (1902) 37 Ct. Cl. 503, holding that when only a portion of a tract of land is appropriated, it will be set apart by metes and bounds, and judgment given for the value of the amount actually taken.

⁶ And it may be here worth noting that this limitation forms part of the same amendment which also declares: "Nor [shall any

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Whatever may be considered as a property right is a proper subject of compensation when it is appropriated or destroyed.⁷ Upon the condemnation of a lock and dam belonging to a navigation company on a navigable river, the government was required to pay the value of the franchise given by the State to take tolls as the value of the tangible property of the company.⁸ And when the United States condemn land in which a municipal corporation, though not owning the fee, has a property right which will be destroyed, in the nature of easements and improvements, including streets, sewers, and water pipes, the corporation is entitled to compensation.⁹

Any prop-
erty right.

Lands under navigable waters are held by the State in trust for public uses, such as navigation and fishery, and the erection thereon of wharves,

Submerged
soil not
private
property.

person] be deprived of life, liberty, or property, without due process of law." This amendment is applicable only to the federal government. The corresponding clause of the Fourteenth Amendment is a prohibition on the States to "deprive any person of life, liberty, or property, without due process of law." While there is no specific prohibition in the Fourteenth Amendment against the taking, by the States or with their authority, of private property without making just compensation, the same end has been attained by such a construction of the Fourteenth Amendment as makes such a taking of private property for private uses or without making just compensation, a deprivation "of property, without due process of law."

⁷ Depriving a riparian owner of the use of a stream by diverting its course for the improvement of a harbor (*Avery v. Fox*, (1868) 1 Abb. (U. S.) 246, 2 Fed. Cas. No. 674) and establishing a line of telegraph upon the right of way of a railroad would be a taking of private property. *Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co.*, (1874) 6 Biss. (U. S.) 158, 2 Fed. Cas. No. 632.

⁸ *Monongahela Nav. Co. v. U. S.*, (1893) 148 U. S. 312.

⁹ *Nahant v. U. S.*, (1905) 136 Fed. Rep. 273.

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piers, light-houses, beacons, and other facilities of navigation, and are not private property. The appropriation of such land by Congress, under its paramount power to regulate commerce, and to authorize the erection of structures thereon, as in the case of the building of piers to support interstate bridges, is not a diversion of the submerged soil from its original public use, nor is such land private property for the taking of which compensation need be given to the State.¹

What Constitutes the Taking of Property.

Taking, destruction, or impairment of usefulness.

In a general way it may be said that the appropriation of land by the officers and agents of the government in carrying out a national policy, and the permanent holding of the land by the government, is a "taking," within the meaning of the constitutional provision.² Yet perhaps only the amount actually invaded, and not the whole tract, should be considered as taken.³ But it is not necessary to constitute a "taking" that there should be an actual occupancy. When real property is destroyed or its usefulness is impaired, it is a taking,⁴ though the government is not in actual occupancy of the land.⁵

Consequential and incidental injury.

The distinction between damage and taking must be observed.⁶ There is a distinction between the taking of property for public uses, and a conse-

¹ *Stockton v. Baltimore, etc., R. Co.*, (1887) 32 Fed. Rep. 9.

² See *Morris v. U. S.*, (1895) 30 Ct. Cl. 162.

³ See *Clark v. U. S.*, (1902) 37 Ct. Cl. 503.

⁴ *Pumpelly v. Green Bay, etc., Canal Co.*, (1871) 13 Wall. (U. S.) 166.

⁵ *King v. U. S.*, (1893) 59 Fed. Rep. 9.

⁶ *Bedford v. U. S.*, (1904) 192 U. S., 217.

quential and incidental injury to property by reason of some public work. In the one case, by reason of this constitutional provision, the law implies a contract, a promise to pay for the property taken, while in the other case there is a simple tortious act doing injury, for which there can be no recovery unless the government acknowledges liability,⁷ and, it would seem, unless the right to recover damages for the consequential injury is expressly conferred by statute;⁸ though Mr. Justice Miller, writing the opinion of the court in *Pumpelly v. Green Bay, etc., Canal Co.*,⁹ said that "there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on watercourses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken."

A permanent flooding of private property is a taking. In *U. S. v. Lynah*,¹ the government, in improving the navigation of the Savannah river, had placed dams and other obstructions in such manner as to hinder its natural flow, and to raise the water, which overflowed the lands of a riparian owner and caused a total destruction of their value. Such a proceeding was held to be an actual appropriation of the land,² and the case of *Mills*

Flooding of
land.

⁷ *U. S. v. Lynah*, (1903) 188 U. S. 445.

⁸ *High Bridge Lumber Co. v. U. S.*, (1895) 69 Fed. Rep. 320.

⁹ (1871) 13 Wall. (U. S.) 166.

¹ (1903) 188 U. S. 445.

² A similar ruling was made in the case of a flooding of lands by the erection of a dam across Fox river, the northern outlet of Lake Winnebago, for the improvement of the river and to enable certain persons to use the waters of the river for hydraulic pur-

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*v. U. S.*³ was referred to approvingly. In the *Mills* case, the flooding of land had unfitted it for rice culture and rendered new drainage necessary where the water levels were suitable. The court held that there was no taking, but simply an injury to the lands which could be remedied, and an action to recover the consequential injury was not sustained.⁴ Any injury consequent upon the building of a revetment which does not change the course of a river, but which operates to maintain the course of the river, is not a taking.⁵

Riparian
right of
access.

The constitutional provision has no application to the riparian right of access to navigability, as that right can be enjoyed only in subjection to the right of the public. "Riparian ownership," said Chief Jus-

poses, as authorized by a statute of Wisconsin Territory. It was held, upon the facts of the case, that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as effectually to destroy or impair its usefulness, it is a taking, within the meaning of the Constitution. *Pumpelly v. Green Bay, etc., Canal Co.*, (1871) 13 Wall. (U. S.) 166.

In undertaking the improvement of the navigation of a river, property is "taken" when it is actually invaded by rendering it absolutely unfit for cultivation, whereby the owner has been compelled to abandon it and has been practically ousted of possession. *Williams v. U. S.*, (1900) 104 Fed. Rep. 50. See *Merriam v. U. S.*, (1894) 29 Ct. Cl. 250.

Where an overflow is not continuous, but annual, rendering the land unfit for cultivation, and entirely destroying its value, there is a taking. *Jackson v. U. S.*, (1896) 31 Ct. Cl. 318.

³ (1891) 46 Fed. Rep. 738.

⁴ Where the injury is the result of the faulty construction of a dam, the damages are consequential. *Hayward v. U. S.*, (1895) 30 Ct. Cl. 219.

⁵ *Bedford v. U. S.*, (1904) 192 U. S. 217, *affirming* (1901) 36 Ct. Cl. 474.

But an easement in the waters of a creek is a property right, and compensation must be given when it is destroyed by a diversion of the creek. *Lowndes v. U. S.*, (1901) 105 Fed. Rep. 838.

tice Fuller, in *Gibson v. U. S.*,⁶ "is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard." The right of compensation for the taking of property has no reference to the case of an owner of land bordering on a public navigable river whose access from his land to navigability is permanently lost by reason of the construction of a pier resting on submerged lands away from but in front of his upland, and which pier was erected by the United States not with any intent to impair the rights of riparian owners, but for the purpose only of improving the navigation of such river. The riparian owner has no property right in the submerged soil.⁷ And where by the construction of a dyke by the United States in a river improvement, the depth of water was reduced and a riparian owner was through the greater part of the season deprived of the use of his landing for the shipment of products from and supplies to his farm, the injury was held to be only consequential.⁸

Where a bridge has been erected by authority of a State before Congress assumes actual jurisdiction over the river for the purposes of navigation, and it is declared to be an obstruction to navigation, such obstruction may be removed without compensation from the United States, and such removal cannot be regarded as a "taking of private property," within the meaning of the Constitution. The

Abatement
or altera-
tion of
bridge.

⁶ (1897) 166 U. S. 269.

⁷ *Seranton v. Wheeler*, (1900) 179 U. S. 141.

⁸ *Gibson v. U. S.*, (1897) 166 U. S. 269.

A very similar case was that of *Friend v. U. S.*, (1895) 30 Ct. Cl. 94.

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Attorney-General so advised the Secretary of War,⁹ citing *Newport, etc., Bridge Co. v. U. S.*,¹ wherein Congress had given permission to erect a bridge across a navigable river, as authorized by the State, the federal permission being given upon condition that it might be revoked at any time if the bridge should be found detrimental to navigation. In such a case no liability could rest on the United States to pay the bridge company for the cost of any change directed in the plan of the bridge.²

Mode of Adjudging and Making, and Measure of, Compensation.

Measure of
compensa-
tion a
judicial
question.

The measure of compensation is a judicial and not a legislative question. The ascertainment of the amount is not an element of the power of appropriation, but the constitutional provision for just compensation for the property taken is merely a condition or limitation upon the use of the power. "The legislature," said Mr. Justice Brewer, in

⁹ *Navigable Waters*, (1896) 21 Op. Atty.-Gen. 430.

¹ (1881) 105 U. S. 470.

² See also *Willamette Iron Bridge Co. v. Hatch*, (1888) 125 U. S. 1.

Under the charter of a bridge company the contract between the bridge company and the State was that the company should have the right to erect, control, and use the bridge as a toll bridge without interference in the way of putting in compulsorily a draw until, under the acts of some authority competent to act, the river should be employed for the purposes of practical navigation. An Act of Congress declared the bridge to be an obstruction to navigation, and required the construction of a draw. Denying the right of the owner of the bridge to compensation was put upon the ground that the reservation in the charter of the right of the State to require a draw to be constructed inured to the nation when the authority of the United States was exercised for the same purpose. *U. S. v. Moline*, (1897) 82 Fed. Rep. 592.

Monongahela Nav. Co. v. U. S.,³ “ may determine what private property is needed for public purposes — that is a question of a political and legislative character; but, when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.”

Though the measure of compensation is a judicial question, it is not necessary that jurisdiction in such cases should be left to the regularly established federal courts. When an executive officer is vested by Act of Congress with power to obtain land by condemnation, without any legislative direction as to the mode of exercising the power, the jurisdiction of any competent tribunal may be invoked to that end. Thus, it has been determined⁴ that a proceeding to take land for public uses by condemnation is a suit at common law, within the meaning of the Judiciary Act of 1789,⁵ conferring upon the Circuit Courts of the United States jurisdiction of all suits at common law or in equity, brought by the United States or any officer thereof under the authority of any Act of Congress. And whether the tribunal

Tribunals.

³ (1893) 148 U. S. 312.

⁴ *Kohl v. U. S.*, (1875) 91 U. S. 367.

⁵ Act of Congress of September 24, 1789, c. 20, 1 Stat. at L. 78, carried forward into § 629, U. S. Rev. Stat. Section 629 was superseded in part by the Acts of March 3, 1875, c. 137, 18 Stat. at L. 470, § 1; of March 3, 1887, c. 373, § 1; and of August 13, 1888, c. 866, § 1. See the title *Judiciary*, in 4 Fed. Stat. Annot., pp. 245 *et seq.*, and 265 *et seq.*

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shall be created directly by an Act of Congress, or whether one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion.⁶

Jury trial.

It seems to be unnecessary that the estimate of just compensation be made by a jury. The Seventh Amendment, providing that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," has reference merely to such suits as at common law were ordinarily tried by jury, and among those a proceeding for condemnation was not included.⁷ In *Great Falls Mfg. Co. v. Atty.-Gen.*,⁸ in reply to the contention that the Act of Congress providing for the supply of the cities of Washington and Georgetown with water from the Potomac river was unconstitutional and void, for that the Act made no provision by which compensation for property taken under it could be constitutionally adjusted and determined, that it did not provide for the ascertainment of such compensation by the verdict of a jury, and that it compelled the plaintiff to have recourse to the Court of Claims, which is a court unknown to the Constitution, being neither a court of equity such as was known at the adoption of that instrument, nor a court of law proceeding according to the rules of the common law, but only a board of referees, constituted by one party to hear such cases as another party will consent to submit to its determination, and without the power to enforce its judgment against the party by whom it is created, the court, speaking through Mr. Justice

Court of
Claims.

⁶ U. S. v. Jones, (1883) 109 U. S. 513.

⁷ See U. S. v. Engerman, (1891) 46 Fed. Rep. 176.

⁸ (1888) 124 U. S. 581.

Harlan, said: "By the very act of suing in the Court of Claims, under the statute of 1882, it [the plaintiff] has not only waived the right, if such right it had, to compensation in advance of the taking of its property, but the right, if such it had, to demand that the amount of compensation be determined by a jury. By the same act it has estopped itself from suggesting that no judgment obtained in the Court of Claims can be enforced against the United States, but must await an appropriation for its payment. When it resorted to that court, it knew that its judgments against the United States could only be paid out of money appropriated for that purpose by Congress. In short, the plaintiff has voluntarily accepted the provisions of the Act of Congress in respect to the mode of ascertaining the compensation to be made to it." But in *Bauman v. Ross*⁹ Mr. Justice Gray said that "by the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; but may be intrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury."¹ So that it would appear that all that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon. Or, as was said by Mr. Justice Brewer in *Backus v. Fort Street Union Depot Co.*,² a case in which it was claimed that, in

Commis-
sioners.

⁹ (1897) 167 U. S. 548.

¹ See also U. S. v. Jones, (1883) 109 U. S. 513.

² (1898) 169 U. S. 557.

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"Due
process
of law."

failing to provide for a jury trial upon condemnation under State authority, the owner had been deprived of the "due process of law" guaranteed by the Fourteenth Amendment: "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."

Full
equivalent.

The requirement that "just compensation" shall be paid means that there must be a full and perfect equivalent for the property taken, and excludes the taking into account, as an element in estimating the compensation, any supposed general benefit that the owner may receive in common with all from the public uses to which his private property is appropriated.³ But inasmuch as the provision contains no express prohibition against considering any benefits, no such prohibition can be implied. In *Bauman v. Ross*,⁴ which was a case arising out of the exercise by Congress, not of the power to regulate commerce, but of the power to legislate for the District of Columbia, Mr. Justice Gray said that it is within the authority of Congress to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable

Consider-
ing benefits.

³ *Monongahela Nav. Co. v. U. S.*, (1893) 148 U. S. 312.

⁴ (1897) 167 U. S. 548.

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II.

computation, caused by the establishment of the highway to the part not taken. And such a rule as to special and direct benefits would seem to be equally applicable on the valuation of property condemned for any purpose for which Congress may take it or authorize it to be taken.⁵

The constitutional provision does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. An Act of Congress authorizing a railroad company to locate a railway, telegraph, and telephone line through the Indian Territory, provided that before the railway should be constructed through any lands proposed to be taken, full compensation should be made to the owners for all property to be taken or damage done by reason of the construction of the road. In the event of an appeal from the finding of the referees, the company was required to pay into the court double the amount of the award, to abide its judgment; and, that being done, the company might enter upon the property sought to be condemned, and proceed with the construction of its road. Such provisions were held sufficiently reasonable, certain, and adequate to secure the just compensation to which an owner was entitled.⁶

Time of,
or provision
for,
payment.

A distinction has been made between a proceeding for actual condemnation and a proceeding merely to ascertain the value of the property it is proposed to take. And so it has been held that where an Act of Congress, adopted for the improvement of a harbor, provides "that the title to any additional lands

Provision
for pay-
ment as
condition of
actual con-
demnation.

⁵ See *Chesapeake, etc., Canal Co. v. Key*, (1829) 3 Cranch (C. C.) 599, 5 Fed. Cas. No. 2649.

⁶ *Cherokee Nation v. Southern Kansas R. Co.*, (1890) 135 U. S. 641.

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acquired for this purpose shall be vested in the United States without charge to the latter," there can be no condemnation proceedings for the appropriation of such lands.⁷ But in the case of a want of provision for the payment of the value of property when ascertained, it has been said that a proceeding may be maintained to ascertain the value of the property on the ground that such a proceeding is not a taking of private property for public use, or one that must necessarily result in such taking, but that it is only preliminary thereto, and for the purpose of ascertaining the value of the property proposed to be taken, and that the final appropriation will not take place, if ever, until the court gives judgment to that effect, which it is not authorized to do, and will not do, until its value has been paid to the owner or into court for it.⁸

⁷ *In re Manderson*, (1892) 51 Fed. Rep. 501, wherein the court said: "The statement of counsel that the damages would be paid by voluntary contributions . . . is too uncertain to be relied on."

⁸ *U. S. v. Oregon R., etc., Co.*, (1883) 16 Fed. Rep. 524.

"The taking of private property should not be allowed until compensation is actually made, thus imposing on the owner no burthen of seeking or pursuing expensive remedies, and leaving him exposed to no risk or expense in obtaining compensation." *Avery v. Fox*, (1868) 1 Abb. (U. S.) 246, 2 Fed. Cas. No. 674.

CHAPTER III.

THE GENERAL POWER OF THE STATES.

THE POWER OF THE STATES OVER DOMESTIC COMMERCE.

OVER its internal or domestic commerce a State has full and exclusive control,¹ though the State regulation may directly affect interstate commerce.²

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Over the instruments of commerce situated wholly within its jurisdiction, a State has exclusive governmental control, except when they are em-

Instru-
ments of
commerce
wholly
intrastate.

¹ *Addyston Pipe, etc., Co. v. U. S.*, (1899) 175 U. S. 211.

Congress "has nothing to do with the purely internal commerce of the States, that is to say, with such commerce as is carried on between different parts of the same State, if its operations are confined exclusively to the jurisdiction and territory of that State, and do not affect other nations or States or the Indian tribes." *Per* Chief Justice Waite, in *Lord v. Goodall, etc., Steamship Co.*, (1880) 102 U. S. 541.

A license to carry on a particular business under an Act of Congress conveys to the licensee no authority to carry on the licensed business within a State. *License Tax Cases*, (1866) 5 Wall. (U. S.) 462.

² *Covington, etc., Bridge Co. v. Kentucky*, (1894) 154 U. S. 204.

Prohibiting the use of the arms or the great seal of the commonwealth, or any representation thereof, for advertising or commercial purposes, is valid. *Com. v. R. I. Sherman Mfg. Co.*, (1905) 189 Mass. 76, *citing* *Plumley v. Massachusetts*, (1894) 155 U. S. 461; *Com. v. Huntley*, (1892) 156 Mass. 236.

So far as a State anti-trust law undertakes to prohibit and render null and void all arrangements, contracts, or agreements whatsoever, between persons, firms, or corporations, which inten-

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played in foreign or interstate commerce. Their regulation for all purposes may be assumed by the State until Congress acts in reference to their foreign or interstate relations, and when Congress acts the State laws are superseded only to the extent that they affect those foreign or interstate relations of the instrumentality.³

LOCAL REGULATIONS OF INTERSTATE COMMERCE.

To meet
varying
circum-
stances of
different
localities.

As a corollary to the proposition that the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation, it is now well settled that the States may legislate on subjects which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited to such localities respectively. "The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject

tionally tend to lessen full and free competition in the importation or sale of articles imported into the State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, it is invalid. *State v. Virginia-Carolina Chemical Co.*, (1904) 71 S. Car. 544.

³ Hall v. De Cuir, (1877) 95 U. S. 485.

"Whilst every instrumentality of domestic commerce is subject to State control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by Congress. No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence." *Per Mr. Justice Harlan, in Northern Securities Co. v. U. S.*, (1904) 193 U. S. 197.

or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded.”⁵

The power of the States to legislate on matters of local concern is largely based upon the idea that such local regulations are in the nature of aids to commerce,⁶ but whether in fact aids to commerce or incidental obstructions, such regulations are within the power of the States until controlled by appropriate federal legislation.⁷

As aids or
incidental
obstruc-
tions to
commerce.

CONSTRUCTION OF STATE STATUTES.

It is a general rule of the Supreme Court of the United States to accept the construction of the courts of a State upon its statutes and constitution when the federal Supreme Court is called upon to decide questions arising under such legislation.⁸

Following
construc-
tion by
State
courts.

⁵ *Per* Mr. Justice Field, in *Mobile County v. Kimball*, (1880) 102 U. S. 691. See also *Leisy v. Hardin*, (1890) 135 U. S. 100; *Gilman v. Philadelphia*, (1865) 3 Wall. (U. S.) 713.

⁶ *Cardwell v. American Bridge Co.*, (1885) 113 U. S. 205; *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 678.

⁷ *Gilman v. Philadelphia*, (1865) 3 Wall. (U. S.) 713.

“The question is not whether, in any particular case, operation may be given to both [federal and State] statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the State law.” *Per* Mr. Justice Brewer, in *Gulf, etc., R. Co. v. Hefley*, (1895) 158 U. S. 98.

⁸ *New York, etc., R. Co. v. Pennsylvania*, (1895) 158 U. S. 431; *Postal Tel. Cable Co. v. Adams*, (1895) 155 U. S. 688.

“As the record presents none of the exceptional conditions which sometimes impel this court to disregard inadmissible constructions

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The construction is given the same effect as if it were part of the statute,⁹ and the decision of a State court whether a particular statute has or has not been repealed is conclusive.¹ As affecting or not interstate or foreign commerce, what the several State courts say their own statutes mean must be accepted, whether it is declared by limiting the objects of their general language to local business, or by separating their provisions into valid and invalid parts.²

Validity as
construed a
federal
question.

After the construction has been given and accepted, the federal question remains, whether the statute as so construed is valid. And though it might admit of question whether a State statute was designed by its framers to affect other than domestic commerce, yet if the State court gives the statute an interpretation which makes it apply to what is understood to be commerce among the States, the construction must be followed, and the statute will be declared invalid.³

When fed-
eral ques-
tion in-
volved in
construc-
tion.

But when the construction of the statute enters into the question of its relationship to commerce, the construction is not binding upon the federal court. A municipal ordinance required a license from a canvasser for the privilege of transacting the business of soliciting orders for goods manu-

given by State courts to even their own State statutes and State constitutions, we shall adopt the construction of the statute of Iowa under consideration, which has been given it by the Supreme Court of that State." *Kidd v. Pearson*, (1888) 128 U. S. 1.

⁹ *Howe Mach. Co. v. Gage*, (1879) 100 U. S. 676.

¹ *Peik v. Chicago, etc., R. Co.*, (1876) 94 U. S. 164.

² *Waters-Pierce Oil Co. v. Texas*, (1900) 177 U. S. 28.

That an objectionable provision may be eliminated by construction, see the chapter on Discriminative State Statutes, *infra*, p. 253.

³ *Wabash, etc., R. Co. v. Illinois*, (1886) 118 U. S. 557; *Hall v. De Cuir*, (1877) 95 U. S. 485.

factured in another State. The State Supreme Court⁴ held that the ordinance was valid as an exercise of the police power in that whether the solicitation from house to house by itinerant vendors or canvassers is an evil to be suppressed or reduced in its proportions by appropriate legislation is under ordinary circumstances a legislative question. But, on a writ of error from the Supreme Court of the United States,⁵ that court was not bound by the decision of the State court on the question whether the tax was an exercise of the police power and not of the taxing power, and held the statute to be of the latter character and void.⁶

THE STATE POLICE POWER.

The doctrine of the police power is one which from its very nature is not susceptible of clear statement, but can only be suggested by general discussion and illustration. In a work dealing with a single one of the grants of power to the federal government, the subject of the exercise of the State police power can be particularly treated only as it is affected by that grant of power, but its general outline may be first suggested. The whole field of State regulation of matters affecting interstate and foreign commerce is more or less concerned with the exercise of this power, so that the application in detail of the principles governing it may be made

⁴ *Titusville v. Brennan*, (1891) 143 Pa. St. 642.

⁵ *Brennan v. Titusville*, (1894) 153 U. S. 289.

⁶ "When the question is raised whether the State statute is a just exercise of State power, or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose." *Per* Mr. Justice Miller, in *Morgan's Steamship Co. v. Louisiana Board of Health*, (1886) 118 U. S. 455.

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Police
regulations
of municipal
corporations.

by reference to the second and third parts of this work.

The so-called police regulations of municipal corporations should not be confused with what are understood in constitutional law as the reserved police powers. The twofold powers of municipal corporations, exercised on the one hand in the performance of public, legislative, or judicial duties, and on the other hand for private, local, or merely corporate purposes, have attached to them distinct rights and liabilities. With probably some conflict of authority on exceptional matters, it may perhaps be said, as illustrating this distinction, that a municipal corporation is not liable in tort for negligence in nonfeasance or misfeasance in the performance of its public duties and governmental functions, but that in the exercise of merely corporate powers, the rules which govern the liability in tort of individuals or private corporations are properly applicable. Such distinctions are in many ways recognized between governmental and corporate functions, the former being frequently referred to as the exercise of a police power, or the power of the municipality to adopt and enforce proper police regulations.

How understood in
a constitutional sense.

In a constitutional sense, however, the exercise of the police power of a State, though perhaps referable to the same source of power, inherent sovereignty, is questioned on the ground of supposed or real repugnance to a constitutional prohibition or limitation.

In the people all sovereignty rests.⁷ In the ex-

⁷ "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are con-

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sovereign
power.

ercise of this sovereign power, the people, and not the separate States, adopted the Federal Constitution creating a national government, granting to that government defined powers and the power "to make all laws which shall be necessary and proper for carrying into execution" those powers.⁸ It is to be observed that these grants of power to the national government are implied limitations on the power of the States to legislate on the subjects of those grants, and all power not thus limited and not expressly prohibited to the States by the national charter, either as originally adopted or by the subsequent amendments, remains in the people to be exercised by them through the instrumentalities of the several State governments. But beside this power that remains in the people, because not granted to the national government nor expressly prohibited, is a reserved or police power, or "the particular right of a government which is inherent in every sovereignty,"⁹ and which may be exercised by the States "to protect the public health, the public morals, and the public safety, by any legislation appropriate to that end, which does not encroach upon rights guaranteed by the national Constitution, nor come in conflict with Acts of Congress

strained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power." *Per Mr. Justice Matthews, in Yick Wo v. Hopkins, (1886) 118 U. S. 356.*

⁸ Article I, § 8.

⁹ *Per Mr. Justice Peckham, in Lake Shore, etc., R. Co. v. Smith, (1899) 173 U. S. 684.*

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passed in pursuance of that instrument.”¹ In *Hennington v. Georgia*,² Mr. Justice Harlan said that “local laws of the character mentioned have their source in the powers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce.”

General
scope.

It would be impossible to state in general terms the extent of this power, but as indicating some measure of its scope, it has been said that “the police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter.”³ The constitutional prohibition that “no State shall . . . pass any . . . law impairing the obligation of contracts” does not only not restrict the power of a State to protect the public morals, the public health, or the public safety, but a State legislature cannot, by any contract, divest itself of the power to provide for these objects.⁴

Power to
regulate as
well as to
prohibit.

The police power is not limited to the mere right to prohibit the doing of a forbidden act or to compel the performance of a prescribed duty, but permission under stated conditions may be a proper

¹ *Per* Mr. Justice Harlan, in *Missouri, etc., R. Co. v. Haber*, (1898) 169 U. S. 613.

² (1896) 163 U. S. 299.

³ *Per* Mr. Justice Lamar, in *Kidd v. Pearson*, (1888) 128 U. S. 1.

⁴ *Wabash R. Co. v. Defiance*, (1897) 167 U. S. 88; *Boston Beer Co. v. Massachusetts*, (1877) 97 U. S. 25.

manifestation of this power; in other words, it includes, within its appropriate limits, the power to regulate or restrict, as well as the power to prohibit.⁵

The Public Health.

As part of this reserved power a State may legislate for the protection of the health of the community. Preventing the spread of contagious diseases among animals is a proper exercise of this power, as by declaring a rule of civil liability for damages caused by transporting cattle liable to communicate disease,⁶ but when the regulation is beyond what is absolutely necessary for the State's self-protection, as by excluding certain cattle at certain seasons whether diseased or not, it cannot be so considered.⁷

Preventing
spread of
contagious
diseases.

Statutes prohibiting the manufacture or sale of oleomargarine colored in imitation of butter,⁸ and prohibiting the importation into the State of coffee so adulterated as to conceal damage,⁹ have been enacted to prevent fraud and deception in the sale of food products, and in the interest of public health. While a State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, it cannot, under cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, are valid, but absolute prohibition of an

Adultera-
tion of food
products.

⁵ *Vance v. W. A. Vandercook Co.*, (1898) 170 U. S. 438.

⁶ *Missouri, etc., R. Co. v. Haber*, (1898) 169 U. S. 613.

⁷ *Hannibal, etc., R. Co. v. Husen*, (1877) 95 U. S. 465.

⁸ *Plumley v. Massachusetts*, (1894) 155 U. S. 461.

⁹ *Crossman v. Lurman*, (1904) 192 U. S. 199.

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unadulterated, wholesome, and pure article cannot be permitted as a remedy against the importation of that which is adulterated and therefore unwholesome.¹ The introduction of an article which is not adulterated and which in its pure state is healthful cannot be prohibited simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains.

Peace, Good Order, and Public Morals.

Prevention
of crime
and pauper-
ism—decep-
tion in sale
of food
products.

State regulations having relation to the peace and good order of the commonwealth and to the promotion or preservation of public morals are within this reserved power. Precautionary measures against social evils, and the prevention of crime and pauperism, by excluding objectionable persons,² or being concerned in the sale of a lottery ticket though such tickets are to be drawn in another State,³ are considered such. Statutes for the prevention of deception or fraud, as in the sale of food products, have some relation to public morals as well as the public health,⁴ and are permissible. Statutes have been enacted in several States prohibiting the running of freight trains on Sundays. In *Hennington v. Georgia*,⁵ such a statute was considered as part of the policy of the State of Georgia, as it was the policy of many of the original States,

¹ *Schollenberger v. Pennsylvania*, (1898) 171 U. S. 1.

² *Hannibal, etc., R. Co. v. Husen*, (1877) 95 U. S. 465; *State v. Stripling*, (1896) 113 Ala. 120; *State v. Harbourne*, (1898) 70 Conn. 484; *Louisville v. Wehmhoff*, (1903) 116 Ky. 812; *Ames v. Kirby*, (1904) 71 N. J. L. 442; *Lacey v. Palmer*, (1896) 93 Va. 159.

³ *Roselle v. Farmers' Bank*, (1897) 141 Mo. 36.

⁴ See *supra*, p. 83.

⁵ (1896) 163 U. S. 299.

to prohibit all persons, under penalties, from using the Sabbath as a day for labor and for pursuing their ordinary callings. The court said that the legislature no doubt acted upon the view that the keeping of one day in seven for rest and relaxation was "of admirable service to a state, considered merely as a civil institution."⁶

The Public Safety.

The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law, provided they do not directly burden or impede interstate traffic or impair the usefulness of the facilities for such traffic.⁷

Construction and operation of railways.

A State may require an examination for fitness to act as a locomotive engineer,⁸ and the examination of railroad employees generally for color blindness.⁹ So also a statute directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto, and prescribing a mode of heating passenger cars, has been held a proper exercise of this power. Possible inconveniences cannot affect the question of the power in each State to make such reasonable regulations for the safety of passengers as in its judgment, all things considered, are appropriate and effective.¹ Until displaced by

⁶ 4 Bl. Com. *63.

⁷ Chicago, etc., R. Co. v. Solan, (1898) 169 U. S. 133; Illinois Cent. R. Co. v. Illinois, (1896) 163 U. S. 142.

⁸ Smith v. Alabama, (1888) 124 U. S. 465.

⁹ Nashville, etc., R. Co. v. Alabama, (1888) 128 U. S. 96.

¹ "Inconveniences of this character cannot be avoided so long as each State has plenary authority within its territorial limits to provide for the safety of the public, according to its own views

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express legislation of Congress, such State laws govern carriers in the discharge of their obligations whether engaged in purely internal commerce of the State, or in commerce among the States.

The Public Convenience.

Recognized
element of
police
power.

The States may legislate not only with reference directly to the public health, the public morals, or the public safety, but also with reference simply to the public convenience, subject of course to the condition that such legislation be not inconsistent with the national Constitution, nor with any Act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it.

Regulating
business of
transporta-
tion and
communi-
cation.

This branch of the police power seems generally to be exercised and recognized in making regulations for the government of corporations occupied in the business of transportation and communication, like railroad and telegraph companies, and which are engaged in a public employment affecting a public interest. Regulating the stoppage of trains at designated places,² and requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations,³ may be considered as legislation having

of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the States covering the same ground." *Per* Mr. Justice Harlan, in *New York, etc., R. Co. v. New York*, (1897) 165 U. S. 628.

² *Lake Shore, etc., R. Co. v. Ohio*, (1899) 173 U. S. 285; *Gladson v. Minnesota*, (1897) 166 U. S. 427.

³ *Chicago, etc., R. Co. v. Fuller*, (1873) 17 Wall. (U. S.) 560. See also *Gulf, etc., R. Co. v. Hefley*, (1895) 158 U. S. 98, as to

in mind the convenience of the public. The States may also require telegraph companies to receive, and to transmit and deliver with due diligence, messages from places either within or without the State,⁴ and may make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require.⁵

As serving the convenience of the public, State legislation authorizing the construction of a permanent bridge over a river within the State, when the bridge in fact interfered with the use of the river by vessels of a certain size which had long been accustomed to navigate it,⁶ and regulating the opening and closing of bridges over a river within the State,⁷ as also authorizing the erection of piers and booms in a navigable river within the State,⁸ is within this part of the police power, and may be allowed to operate in the absence of federal direction.

Construction and regulation of bridges.

Invading Exclusive Power of Congress.

Whatever the reason given or the object to be attained, the acknowledged police power of a State

a similar statute, in which case Mr. Justice Brewer said: "It may be conceded that were there no congressional legislation in respect to the matter, the State Act could be held applicable to interstate shipments as a police regulation."

⁴ *Western Union Tel. Co. v. James*, (1896) 162 U. S. 650.

But a State may not regulate the delivery of messages outside the State sent from points within the State. *Western Union Tel. Co. v. Pendleton*, (1887) 122 U. S. 347.

⁵ *Western Union Tel. Co. v. Pendleton*, (1887) 122 U. S. 347.

⁶ *Cardwell v. American Bridge Co.*, (1885) 113 U. S. 205; *Gilman v. Philadelphia*, (1865) 3 Wall. (U. S.) 713.

⁷ *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 678.

⁸ *Pound v. Turk*, (1877) 95 U. S. 459.

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Direct interference with matters in exclusive jurisdiction of Congress.

cannot legitimately be exerted so as substantially to prohibit or unnecessarily to burden either foreign or interstate commerce. It cannot be exercised so as to trench directly upon that part of the power to regulate interstate and foreign commerce which is within the exclusive jurisdiction of Congress, any more than to defeat or impair a statute passed by Congress relating to that part of the power upon which the States may legislate under the nonaction of Congress doctrine.⁹ As was said by Chief Justice Fuller, in *Leisy v. Hardin*,¹ "While, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action."

With particular reference to transportation.

The matters which are within the exclusive control of Congress, as resulting from the grant of power to that body, have been referred to in a general way in another part of this book,² but in this connection it may be recalled that they relate mainly to the right of interstate transportation and of the exchange of commodities. In *Austin v. Tennessee*,³ wherein it was held that the law of Tennessee prohibiting the sale of cigarettes could not be evaded by the importation from another

⁹ *Schollenberger v. Pennsylvania*, (1898) 171 U. S. 1; *Brennan v. Titusville*, (1894) 153 U. S. 289; *Missouri, etc., R. Co. v. Haber*, (1898) 169 U. S. 613; *Hannibal, etc., R. Co. v. Husen*, (1877) 95 U. S. 465; *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 1.

¹ (1890) 135 U. S. 100.

² See *supra*, p. 58.

³ (1900) 179 U. S. 343.

State of cigarettes in packages too small to be considered original packages, Mr. Justice Brown, in the opinion of the court, said: "The doctrine that the silence of Congress as to what property may be of right carried from one State to another means that every article of commerce may be carried into one State from another and there sold, ought not to be extended so as to embrace articles which may not unreasonably be deemed injurious in their use to the health of the people. If this be not so, it follows that the reserved power of the State to protect the health of its people, by reasonable regulations, has application only in respect of articles manufactured within its own limits, and that an open door exists for the introduction into the State, against its will, of all kinds of property which may be fairly regarded as injurious in their use to health. If Congress have power to declare what property may and what may not be brought into one State from another State, then the action of a State by which certain articles, not unreasonably deemed injurious to health, were excluded from its markets, should stand until Congress legislated upon the subject. If Congress possesses no such power, it is because the framers of the Constitution never intended that the mere grant of power to regulate commerce should override the power reserved by the States to pass laws that had substantial relations to the health of their people. Of course, it is one thing to force into a State, against its will, articles or commodities that can have no possible connection with or relation to the health of the people. It is quite a different thing to force into the markets of a State, against its will, articles or commodities which, like cigarettes, may not unreasonably be held to be injurious to health."

Chapter
III.

Exercised
over the
instrumental-
ities of
transporta-
tion.

While the police power cannot be exercised over a subject confided exclusively to Congress — such as commerce itself — that power may be exercised with respect to the instrumentalities of such commerce. In *Louisville, etc., R. Co. v. Kentucky*,⁴ Mr. Justice Brown clearly distinguished between the exclusive power of Congress with respect to commerce itself and the subordinate power of the States over the instrumentalities of commerce, and said that “it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under State authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.”

Direct con-
flict with
Acts of
Congress.

When a State statute has been enacted in pursuance of this reserved police power, on a subject not within the exclusive power of Congress, it must nevertheless yield in the execution of its provisions in case of conflict with an Act of Congress constitu-

tionally enacted, when the repugnance is so direct and positive that the two acts cannot be reconciled or stand together.⁵ And in line with the idea that the conflict between State and federal legislation must be positive to have the effect of invalidating State statutes, it has been said that, "although the power of Congress to regulate commerce among the States, and the power of the States to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the national and State governments or produce any conflict between the two governments in the exercise of their respective powers need occur, unless the national government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the State legislation may refer."⁶

Incidental Effect of Invading Exclusive Power of Congress.

It has been heretofore remarked that the police power of a State cannot legitimately be exerted so as substantially to prohibit or unnecessarily to burden either foreign or interstate commerce. But the interference with the commercial power of the general government to be unlawful must be direct and not the mere incidental effect of enforcing the police powers of the State. If the State law in its opera-

Indirect
and remote
inter-
ference.

⁵ Missouri, etc., R. Co. v. Haber, (1898) 169 U. S. 613; Sinnot v. Davenport, (1859) 22 How. (U. S.) 227.

⁶ Per Mr. Justice Harlan, in Missouri, etc., R. Co. v. Haber, (1868) 169 U. S. 613. See also Reid v. Colorado, (1902) 187 U. S. 137.

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tion affects interstate or foreign commerce only indirectly and remotely, and is otherwise unobjectionable, it is valid.⁷ With respect to police regulation of interstate railways, Mr. Justice Brown, in *Louisville, etc., R. Co. v. Kentucky*,⁸ remarked: "All such regulations interfere indirectly, more or less, with commerce between the States, in the fact that they impose a burden upon the instruments of such commerce, and add something to the cost of transportation, by the expense incurred in conforming to such regulations. These are, however, like the taxes imposed upon railways and their rolling stock, which are more or less, according to the policy of the State within which the roads are operated, but are still within the competency of the legislature to impose. It is otherwise, however, with respect to taxes upon their franchises and receipts from interstate commerce, which are treated as a direct burden."

Instances of
incidental
inter-
ference.

A few of the many ways by which the exercise of this power incidentally affects commerce may be mentioned by way of illustration. Regulating the speed of trains, including interstate trains, within city limits,⁹ and the rates of fare and freight of a railroad situated within the limits of the State;¹

⁷ "If the action of the State legislature were a *bona fide* exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce." *Per* Mr. Justice Brown, in *Austin v. Tennessee*, (1900) 179 U. S. 343. See also *Field v. Barber Asphalt Paving Co.*, (1904) 194 U. S. 618; *Smith v. Alabama*, (1888) 124 U. S. 465; *Hall v. De Cuir*, (1877) 95 U. S. 485.

⁸ (1896) 161 U. S. 677.

⁹ *Erb v. Morasch*, (1900) 177 U. S. 584; *Crutcher v. Kentucky*, (1891) 141 U. S. 47.

¹ *Chicago, etc., R. Co. v. Iowa*, (1876) 94 U. S. 155.

The enforcement of a State regulation forbidding discrimination

prohibiting the running of freight trains on Sunday;² promoting the safety and comfort of passengers, employees, persons crossing railroad tracks, and adjacent property owners;³ and establishing a rule of evidence ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line,⁴ may be said to affect interstate transportation to some extent or for a limited time. And general legislation of a State as it may declare liability for torts committed on land or water is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce.⁵ Until displaced by regulations adopted by the general government, such State laws operate both upon the purely internal commerce of the State and upon the commerce among the States and with foreign countries.

While the power of the State to adopt police regulations which may incidentally burden commerce is admitted, the power is occasionally so exercised as to be an aid to rather than a burden on commerce. There are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the State upon the part of those

Exercised
as an aid to
commerce.

in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally, but such result is too remote and indirect to be regarded as an interference with interstate commerce. *Louisville, etc., R. Co. v. Kentucky*, (1902) 183 U. S. 503.

² *Hennington v. Georgia*, (1896) 163 U. S. 299.

³ *Pennsylvania R. Co. v. Hughes*, (1903) 191 U. S. 477.

⁴ *Richmond, etc., R. Co. v. R. A. Patterson Tobacco Co.*, (1898) 169 U. S. 311.

⁵ *Sherlock v. Alling*, (1876) 93 U. S. 99.

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who are engaged in interstate commerce. Especially is this so with respect to regulations having in view the convenience of the public, as in enforcing track connections between two railroads,⁶ and to rules for the safety of persons and property. They are rather to be regarded as legislation in aid of commerce, and are considered with special favor by the courts.⁷

In further-
ance of a
federal
policy.

The same quality, as an aid to commerce, may attach to State legislation which, instead of being in conflict with an Act of Congress, is in furtherance of a declared federal policy with respect thereto. A State statute declaring a rule of civil liability for damages caused by transporting cattle liable to communicate disease is one in aid of the Animal Industry Act,⁸ providing means for the prosecution and cure of contagious diseases of domestic animals and regulating the examination and transportation of animals so affected.⁹

Reasonableness of Its Exercise as the Supreme Test.

But when a State statute has been enacted which may be said to have relation to the public morals, the public health, the public safety, or the public convenience, the subject of which is not within the exclusive power of Congress or which in its operation does not conflict with an Act of Congress, the last and supreme test is that of reasonableness. Wanting in exactness as the whole subject of police power is, this final test of reasonableness lacks

Indefinable.

⁶ Wisconsin, etc., *R. Co. v. Jacobson*, (1900) 179 U. S. 287.

⁷ Chicago, etc., *R. Co. v. Solan*, (1898) 169 U. S. 133.

⁸ Act of Congress of May 29, 1884, c. 60; 1 Fed. Stat. Annot. 451.

⁹ Missouri, etc., *R. Co. v. Haber*, (1898) 169 U. S. 613.

definiteness more than any other element, for "the exact limit of lawful legislation upon this subject cannot in the nature of things be defined. It can only be illustrated from decided cases, by applying the principles therein enunciated, determining from these whether in the particular case the rule be reasonable or otherwise."¹ A statute passed in pursuance of any of the purposes for which this power may be exercised must have a real or substantial relation to the object for which it was enacted, and if it unreasonably or unnecessarily hampers commerce between the States, or fails to make allowance for the practical difficulties in the administration of the law, it cannot be approved.

A comparison of the *Cleveland, etc., R. Co. v. Illinois*,² *Gladson v. Minnesota*,³ and *Illinois Cent. R. Co. v. Illinois*⁴ cases, referred to in another part of this work,⁵ respecting statutes requiring railroads to stop passenger trains at certain stations, will give some idea as to what have been held to be reasonable and unreasonable regulations on similar matters.

Stoppage
of trains at
certain
stations.

In *Houston, etc., R. Co. v. Mayes*⁶ attention was particularly called to the practical difficulties of administering the law under consideration. In that case, a Texas statute, the material requirement of which was that when the shipper of freight should make a requisition in writing for a number of cars to be furnished at any point indicated within a cer-

Requiring
carriers to
supply cars.

¹ Per Mr. Justice Brown, in *Houston, etc., R. Co. v. Mayes*, (1906) 201 U. S. 321.

² (1900) 177 U. S. 514.

³ (1897) 166 U. S. 427.

⁴ (1896) 163 U. S. 142.

⁵ See *infra*, pp. 165-167.

⁶ (1906) 201 U. S. 321.

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III.

Making re-
quirements
absolute.

tain number of days from the receipt of the application, and should deposit one-fourth of the freight with the agent of the company, the company failing to furnish them should forfeit twenty-five dollars per day for each car failed to be furnished, the only proviso being that the law "shall not apply in cases of strikes or other public calamity," was held to be invalid as applied to cars required for interstate shipments; and the court, admitting that there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, the heating, lighting, and ventilation of passenger cars, and the furnishing of food and water to cattle and other live stock, said, through Mr. Justice Brown: "We think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the State and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather. . . . While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected

turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfil all its legal requirements cannot provide for, and against which the statute in question makes no allowance.”

While the presumption that a statute was enacted in good faith, for any of the purposes for which this power can be exercised, may and should be indulged, yet its operation and validity must be determined by its natural and reasonable effect,⁷ and this presumption cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. “There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.”⁸

Presump-
tion of good
faith—va-
lidity de-
termined
by reason-
able effect.

INSPECTION LAWS.

One of the clauses of section 10, Article I, of the Constitution provides that “no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.”⁹ The clause is a constitutional recognition

⁷ *Henderson v. New York*, (1875) 92 U. S. 259.

⁸ *Per* Mr. Justice Harlan, in *Minnesota v. Barber*, (1890) 136 U. S. 313.

⁹ This prohibition on the power of the States to “lay any imposts or duties on imports or exports” is discussed in another part of this work, and it is there shown that the words “imports” and “ex-

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When they
may oper-
ate.

of the power of the States to enact inspection laws with respect to goods imported from and to be exported to foreign countries, and a similar power has been construed into the commerce clause with regard to commerce between the States as part of the police power of the State. Whenever inspection laws act on a subject before it becomes an article of commerce, they are confessedly valid as matters of domestic concern. They may also be made to operate upon articles brought from one State into another for the purpose of determining their fitness for domestic use, and in so doing protecting the citizens from fraud.¹

Under the
"imports or
exports"
clause.

So far as the above-quoted clause is concerned, inspection laws operating on articles intended for export or for domestic use "are confined to such particulars as, in the estimation of the legislature and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving to the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use or consumption. They are not founded on the idea that the things in respect to which inspection is required are dangerous or noxious in themselves."² In *Turner v. Maryland*,³ the court, through Mr. Justice Blatchford, said: "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package,

ports" refer only to articles imported and exported to foreign countries. See *infra*, p. 264.

¹ *Patapsco Guano Co. v. North Carolina Board of Agriculture*, (1898) 171 U. S. 345.

² *Per* Mr. Justice Matthews, in *Bowman v. Chicago, etc., R. Co.*, (1888) 125 U. S. 465.

³ (1882) 107 U. S. 38.

mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters.”

Under the commerce clause, to ascertain the fitness of articles, including food products, for use, inspection laws must be appropriate and reasonable, and the absolute prohibition of an unadulterated, healthful, and pure article, or one universally recognized as harmless, cannot be permitted as a remedy against the importation of that which is adulterated or harmful.⁴ The right to sell articles imported into a State in the original packages does not interfere with the acknowledged right of the State to use such means as may be necessary to prevent the introduction of an adulterated article,⁵ and though the operation of the laws may in some cases in a slight degree affect commerce, they cannot be properly designated as regulations of commerce when they serve the convenience and comfort of the inhabitants of the State in the conduct of their business.⁶ Requiring articles to be carried to a State warehouse for inspection is not unreasonable,⁷ and a statute providing for the appointment of gaugers

Must be
appropriate
and reason-
able.

⁴ *Schollenberger v. Pennsylvania*, (1898) 171 U. S. 1; *Austin v. Tennessee*, (1900) 179 U. S. 343.

⁵ *Schollenberger v. Pennsylvania*, (1898) 171 U. S. 1.

⁶ *Pittsburg, etc., Coal Co. v. Louisiana*, (1895) 156 U. S. 590.

⁷ *Turner v. Maryland*, (1882) 107 U. S. 38.

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of coal and coke boats and prescribing a rule by which the capacity of the carrying vessels can be determined does not conflict with the power vested in Congress over commerce.⁸

Cannot
operate in
advance of
importa-
tion.

But an inspection law cannot be made to operate in advance of the actual importation of the goods to be inspected, so as to cut off the right of a citizen to ship articles of commerce to another State. One of a series of dispensary laws of the State of South Carolina provided, in part, that a sample of the liquor proposed to be shipped into the State should be sent to a State officer for analysis in advance of the shipment, and that a certificate of the officer should be attached to the package containing the liquor when it was shipped into the State. In *Vance v. W. A. Vandercook Co.*⁹ the court, Mr. Justice White writing the opinion, said that the statute "deprives any nonresident of the right to ship by means of interstate commerce any liquor into South Carolina unless previous authority is obtained from the officers of the State of South Carolina. On the face of these regulations, it is clear that they subject the constitutional right of the nonresident to ship into the State and of the resident in the State to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of the citizen of another State to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the State of South Carolina without admitting the power of that officer to control the exercise of the right."

⁸ *Pittsburg, etc., Coal Co. v. Louisiana*, (1895) 156 U. S. 590.

⁹ (1898) 170 U. S. 438.

When it is not asserted that a particular police regulation is invalid, a finding of fact by a commissioner, acting in the discharge of his duty under the law, that a brand of coffee is so prepared as to conceal damage or inferiority, does not in itself constitute such a direct interference with interstate commerce as to give a Circuit Court, as a court of the United States, jurisdiction on the ground of diverse citizenship. "The suggested controversy was purely hypothetical and based the supposed constitutional objections on the contingency that, on issues of fact, it might be judicially determined that Ariosa came within the statute, which complainants denied. If the commissioner's conclusions were erroneous, the courts were open for the correction of the error, and the possibility that they might agree with the commissioner could not be laid hold of as tantamount to an actual controversy as to the effect of the Constitution, on the determination of which the result of the present suit depended."¹

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III.

Effect of
finding of
fact by
administra-
tive officer.

That the power of a State to pass inspection laws is further limited by the consideration that there must be no discrimination against the products of other States and foreign countries, is shown hereafter in discussing the effect of discriminative State statutes.²

Absence of
discrimina-
tion.

QUARANTINE AND HEALTH LAWS.

In the *Passenger Cases*³ the court adjudged certain statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those States, to be invalid. There was no

Taxes upon
alien pas-
sengers.

¹ *Per* Chief Justice Fuller, in *Arbuckle v. Blackburn*, (1903) 191 U. S. 405.

² See *infra*, p. 256.

³ (1849) 7 How. (U. S.) 283.

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opinion of the court, as a court, and each of the justices wrote a separate opinion or concurred in that of one of the other justices, but Mr. Justice Wayne said: "I think the court means now to decide . . . 9. That the States of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound, and that the States may, in the exercise of such police power, without any violation of the power in Congress to regulate commerce, exact from the owner or consignee of a quarantined vessel, and from the passengers on board of her, such fees as will pay to the State the cost of their detention and of the purification of the vessel, cargo, and apparel of the persons on board."

Congressional
recognition
of state
laws.

The power of the States to adopt such regulations was recognized by Congress as early as the Act of May 27, 1796,⁴ and Chief Justice Marshall, in *Gibbons v. Ogden*,⁵ referring to this Act and the Act of February 25, 1797,⁶ said: "But they do not

⁴ 1 Stat. at L. 474, c. 31.

⁵ (1824) 9 Wheat. (U. S.) 1. See also *Louisiana v. Texas*, (1900) 176 U. S. 1; *Morgan's Steamship Co. v. Louisiana Board of Health*, (1886) 118 U. S. 455.

⁶ 1 Stat. at L. 619, c. 12, carried forward into §§ 4792 *et seq.*, Rev. Stat. U. S., 3 Fed. Stat. Annot. 214.

imply an acknowledgment that a State may rightfully regulate commerce with foreign nations, or among the States; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the Acts of Congress, and are considered as flowing from the acknowledged power of a State to provide for the health of its citizens. But, as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with and be affected by the laws of the United States, made for the regulation of commerce, Congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the States. But in making these provisions, the opinion is unequivocally manifested, that Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce."

In exercising this power, however, care should always be taken that the means employed to that end do not go beyond the necessities of the case or unreasonably burden interstate commerce.⁷ A State may exclude healthy persons from an infected local-

Power
limited by
necessities
of the case.

⁷ Reid v. Colorado, (1902) 187 U. S. 137.

As to disinfecting imported rags, see Train v. Boston Disinfecting Co., (1887) 144 Mass. 523; Bartlett v. Lockwood, (1896) 160 U. S. 357.

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ity,⁸ and may quarantine against diseased animals. A statute of Colorado declared, in effect, that live stock, between the dates and from the territory specified in the Act, are ordinarily in such condition that their presence in the State may be dangerous to its domestic animals, and required that before being sent into the State they should either be kept at some place north of the 36th parallel of latitude for ninety days prior to their importation into the State or that the owner should obtain from the State officers a bill of health. In *Reid v. Colorado*⁹ the court said that, without any evidence bearing upon the reasonableness or unreasonableness of the particular methods adopted by the State to protect its domestic animals, it could not be said that the statute unduly burdened the exercise of the privilege of engaging in interstate commerce, and held that the statute did not cover the same ground as, and therefore was not inconsistent with, the Act of Congress known as the Animal Industry Act.¹

Against
animals
exposed to
disease.

Protection may not only be provided against diseased animals, but against animals which have been exposed to disease.² The adoption of rules of civil liability for damages that may accrue from having in possession certain cattle which have not been wintered North, and allowing such cattle to run at large,³ and from transporting cattle liable to impart and capable of communicating Texas, splenic,

⁸ *Compagnie Française, etc., v. Louisiana State Board of Health*, (1902) 186 U. S. 380.

⁹ (1902) 187 U. S. 137.

¹ Act of May 29, 1884, c. 60; 1 Fed. Stat. Annot. 451. See also *Hannibal, etc., R. Co. v. Husen*, (1877) 95 U. S. 465.

² *Smith v. St. Louis, etc., R. Co.*, (1901) 181 U. S. 248; *Rasmussen v. Idaho*, (1901) 181 U. S. 198.

³ *Kimmish v. Ball*, (1889) 129 U. S. 217.

or Spanish fever to native cattle,⁴ does not conflict with the power of Congress to regulate commerce. But a statute prohibiting the transportation of certain cattle at a stated season of the year without regard to whether they are infected or not is a plain interference with interstate commerce. A Missouri statute prohibited the driving or otherwise conveying into or remaining in any county of the State, of any Texas, Mexican, or Indian cattle between the first day of March and the first day of November in each year. In *Hannibal, etc., R. Co. v. Husen*⁵ it was held that the statute was neither a quarantine nor an inspection law, and the court said: "The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

Without regard to infection or exposure thereto.

INSPECTION AND QUARANTINE CHARGES AND FEES.

In enacting inspection and quarantine laws, the States may authorize the exaction of fees and charges no more than sufficient to defray the costs and expenses incurred.⁶ A statute of Virginia, providing for the inspection of meat slaughtered over

Sufficient to pay costs and expenses.

⁴ *Missouri, etc., R. Co. v. Haber*, (1898) 169 U. S. 613.

⁵ (1877) 95 U. S. 465.

⁶ *Patapsco Guano Co. v. North Carolina Board of Agriculture*, (1898) 171 U. S. 345; *Morgan's Steamship Co. v. Louisiana Board of Health*, (1886) 118 U. S. 455; *Passenger Cases*, (1849) 7 How. (U. S.) 283. See also *infra*, as to duties of tonnage, p. 275.

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one hundred miles from the place at which it was offered for sale, declared, "and for all fresh meat so inspected said inspector shall receive as his compensation one cent per pound to be paid by the owner of the meat." In *Brimmer v. Rebman*⁷ it was held that, even if the other provisions could be sustained as an inspection law, the statute was in effect a prohibition upon the sale in Virginia of meats entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale, because the owner, being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, could not compete upon equal terms, in the markets of that Commonwealth, with those in the same business whose meats of like kind, from animals slaughtered within less than one hundred miles from the place of sale, were not subjected to inspection.

Power of
courts or
Congress to
declare
excessive.

While the courts may declare inspection fees excessive, and therefore invalid so far as the inspection is of articles entering into the State from other States, a different rule seems to obtain with respect to articles imported from foreign countries, and this because the clause of Article I, section 10, prohibiting the States from laying any imposts or duties on imports or exports, "except what may be absolutely necessary for executing its inspection laws," also provides that "all such laws shall be subject to the revision and control of Congress." In *Turner v. Maryland*,⁸ Mr. Justice Blatchford said: "As is suggested in *Neilson v. Garza*, (1876) 2 Woods (U. S.) 287, by Mr. Justice Bradley, it may be doubt-

⁷ (1891) 138 U. S. 78.

⁸ (1882) 107 U. S. 38.

ful whether it is not exclusively the province of Congress, and not at all that of a court, to decide whether a charge or duty, under an inspection law, is or is not excessive.”⁹

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⁹ See also *Patapsco Guano Co. v. North Carolina Board of Agriculture*, (1898) 171 U. S. 345; *State v. Bixman*, (1901) 162 Mo. 1.

PART II.

SUBJECTS OF REGULATION.

CHAPTER IV.

MANUFACTURE AND PRODUCTION.

Chapter IV.

Manufac-
ture and
production
as matters
of domestic
concern.

AS the power delegated to Congress is limited to "commerce with foreign nations, and among the several States, and with the Indian tribes," there is an internal commerce which is subject to the exclusive control of the States. The principle that manufacture and production are not commerce was clearly stated by Mr. Justice Lamar in *Kidd v. Pearson*.¹ He said: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation." And it was said by Chief Justice Fuller, in *U. S. v. E. C. Knight Co.*,² that "Commerce succeeds to manufacture, and is not a part of it."

Prohibiting
manufac-
ture for
export.

In the *Kidd v. Pearson* case, *supra*, it was held that a statute of Iowa which, as construed by the State Supreme Court, provided that intoxicating

¹ (1888) 128 U. S. 1.

Packing houses are not engaged in interstate commerce. *U. S. v. Boyer*, (1898) 85 Fed. Rep. 425.

² (1895) 156 U. S. 1.

Chapter
IV.

liquors might be manufactured and sold within the State for chemical, medicinal, culinary, and sacramental purposes, but for no other — not even for the purpose of transportation beyond the limits of the State — was within the police power of the State, and that one who manufactured liquors exclusively for exportation and sale outside the State was within the prohibition of the statute. The court distinctly recognized and applied the rule that the fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce within the meaning of the Constitution.³

Foreign
corporation
engaging
in manu-
facture to
comply
with State
law.

This question of the power of a State to control corporations engaged in manufacture was raised in a peculiar way under a statute of Wisconsin requiring that a company incorporated elsewhere file a copy of its charter with the Secretary of State, and pay a small fee as a condition of doing business there. A foreign corporation entered into a contract within the State for the erection of a factory to be operated under the supervision of the officers of the foreign corporation, and the fact that the product was intended to be used outside the State, and that, indeed, very little could be used within the State, was held not to exempt the foreign corporation from compliance with the requirements of the State statutes.⁴ An Ohio statute allowing the manufacture and sale of oleomargarine when free from any coloring matter or other ingredient causing it to look like or to appear to be butter as defined in the statute, and expressly forbidding the manufacture or sale within the State of any

³ See *infra*, p. 152, and *Mugler v. Kansas*, (1887) 123 U. S. 623.

⁴ *Diamond Glue Co. v. U. S. Glue Co.*, (1903) 187 U. S. 611.

oleomargarine which contained any methyl orange, butter yellow, annatto, aniline dye, or any other coloring matter, was held not to violate this clause when all the acts of the corporation which were complained of related to oleomargarine manufactured by it in the State of Ohio, in violation of the laws of that State, and therefore operated on the corporation within the State and affected the product manufactured by it before it had become a subject of interstate commerce.⁵

In *Addyston Pipe, etc., Co. v. U. S.*⁶ the defendants were engaged in the manufacture, sale, and transportation of iron pipe at their respective places of business in the States of their residence, and had entered into a combination among themselves by which they agreed that there should be no competition between them in any of the States or Territories mentioned in the agreement in regard to the manufacture and sale of cast-iron pipe. Thus provision was made, not alone for the manufacture but for the sale of the manufactured product, and the contract directly affected, not as a mere incident of manufacture, the sale of the articles over the territory embraced in the contract. The contract was held to be within the terms and purpose of the Sherman Anti-Trust Act.⁷

Combina-
tion of
manufac-
turers to
abstain
from com-
petition in
sales of
products.

It was urged that this case was within the principle of the decision in the *E. C. Knight Co.* case, *supra*. In that case it was held that although the American Sugar Refining Company, by means of a combination, had obtained a practical monopoly of the business of manufacturing sugar, yet the Act of

Combina-
tion of
manufac-
turers to
monopolize
manufac-
ture.

⁵ *Capital City Dairy Co. v. Ohio*, (1902) 183 U. S. 238.

⁶ (1899) 175 U. S. 211.

⁷ Act of Congress of July 2, 1890, c. 64, 7 Fed. Stat. Annot. 336.

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Congress did not touch the case, because the combination related to manufacture only and not to commerce among the States or with foreign nations. The direct purpose was the control of the manufacture of sugar; there was no combination or agreement, in terms, regarding the future disposition of the manufactured article, nothing looking to a transaction in the nature of interstate commerce. On the other hand, in the *Addyston Pipe, etc., Co.* case, *supra*, while no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention to increase, directly and by means of such combination, the price for which all contracts for delivery within the territory embraced by the contract should be made.

Distinction
between
manufac-
ture and
domestic
sales and
interstate
sales.

As giving point to the distinction between the domestic business of the defendants, so far as it consisted of the manufacture and sale wholly within their respective States, and that part of their business which related to the delivery of pipe after manufacture from their respective States to the other States and Territories covered by their contract, the court modified the judgment of the Court of Appeals so far as it included in its scope the enjoining of the defendants from combining in regard to contracts for selling pipe in their own State, and limited it to that portion of the combination or agreement which had relation to interstate sales.

Propo-
sitions re-
lated in
Northern
Securities
case.

And as adding further emphasis to this distinction, Mr. Justice Harlan, after reviewing, in the case of *Northern Securities Co. v. U. S.*,⁸ the cases which had been decided under the statute, sum-

⁸ (1904) 193 U. S. 197.

marized the propositions deducible therefrom, and having special reference to the question decided in the *Addyston Pipe, etc., Co.* case, *supra*, said: "Although the Act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations. . . . Combinations even among private manufacturers or dealers whereby interstate or international commerce is restrained are equally embraced by the Act."

The power of Congress in some measure indirectly to regulate production and manufacture must be conceded. By denying the facilities of interstate transportation in the case of commodities which have not been manufactured under federal supervision, this object may be attained. To insure the interstate and foreign trade in pure and unadulterated foods, and to prevent frauds upon purchasers of goods which are upon the interstate and foreign market, Congress would seem to have ample power. But there must be some limit, some line of demarcation between the power of Congress and of the States, in controlling the processes of manufacture, beyond which Congress cannot step. That there must be a limit to the power of Congress in this regard is evident both from the nature of the subject and from the judicial recognition and insistence that manufacture is not commerce, or, at any rate, that in and of itself it is a matter of domestic concern.

Power of Congress to deny transportation facilities.

Chapter
IV.Extent of
power of
Congress
suggested.

The remark of Chief Justice Fuller, that "commerce succeeds to manufacture," in the *E. C. Knight Co.* case, *supra*, is very suggestive in this connection.⁹ It will have been noticed that in the *Addyston Pipe, etc., Co.* case, *supra*, while the contract or combination was entered into with respect to articles to be thereafter manufactured, the contract nevertheless had reference to contracts of sale and delivery in other States and Territories than those in which the respective manufacturers resided, and as it tended to restrain interstate trade in those articles, in violation of the statute, the conspirators were enjoined from carrying out that part of their contract, but neither their right to manufacture nor their purely domestic trade could be affected by a federal statute. And in the supposed cases of indirect interference, by denying the privileges of interstate transportation in the interest of the consumer, the exercise by Congress of such a right would seem to be referable to a power in the nature of an ultra-constitutional or federal police regulation.¹ To the extent that manufacturers, in so far as their business is concerned in finding an interstate or foreign market for their products, may be subject to the rules prescribed by Congress by which that commerce shall be governed, as by the rule of free competition, and to such regulations as may be adopted to insure the quality of the articles transported and for the prevention of fraud and imposition—to

⁹ As is also that of Chief Justice Waite, that "commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade," made in *McCready v. Virginia*, (1876) 94 U. S. 391, wherein the right of a State to grant the exclusive use of the land under its waters to its own citizens for the propagation of oysters was affirmed.

¹ See *supra*, p. 51.

this limit, the power of Congress may probably be exerted.

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IV.

But if, under the guise of its power to regulate interstate and foreign transportation, Congress were to attempt to control the processes of production and manufacture, with the avowed or ostensible purpose of regulating matters which are of purely domestic or local concern, and with no federal policy to be promoted, it must be that the line, faint though it be, which marks the boundary of federal and State power, would seemingly be overstepped. For instance, labor laws, strictly so called, are assuredly matters of State regulation. It may be, in order to secure the purity or quality of articles to be transported from one State to another and to foreign countries, that Congress can prohibit the transportation of articles which have not been produced under conditions guaranteeing their purity and fitness for consumption, and can probably stipulate for the freedom from certain diseases of the persons employed, as well as for the sanitary condition of the premises. Here there would be an element of the federal policy — a national guaranty of the quality of the article. But federal laws regulating the hours of labor and prohibiting the employment of children, and making a conformity to those laws a condition to the interstate transportation of the goods manufactured, proper subjects of regulation though these may be, can have no relation to anything more than matters of local concern, as it is difficult to see how such regulations can be embraced by any conceivable rule of commerce, or how they can be considered such police regulations as would serve any distinctively federal purpose.

Power of
Congress
to control
processes
of manu-
facture
limited.

CHAPTER V.

SALE, PURCHASE, AND EXCHANGE OF COMMODITIES.

POWER OF CONGRESS IN GENERAL.

Chapter V.

Interstate
sales within
exclusive
power of
Congress.

THAT part of interstate commerce which consists in the sale, purchase, and exchange of commodities for transportation from one State to another is national in its character and must be governed by a uniform system, and is within the exclusive power of Congress to control. So long as Congress does not pass any law regulating it, or allowing the States to do so, it thereby indicates its will that such commerce shall be free.¹

Intrastate
sales within
exclusive
power of
the States.

On the other hand, Congress is without power to legislate respecting the traffic which is intrastate. This was clearly indicated in the case of *Addyston Pipe, etc., Co. v. U. S.*,² referred to heretofore, in considering the subject of manufacture, in which case the court modified the judgment in so far as it included in its scope the enjoining of the defendants from combining in regard to contracts of sale to be performed within their respective States.

¹ Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. *Addyston Pipe, etc., Co. v. U. S.*, (1899) 175 U. S. 211, *citing* *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 196; *Kidd v. Pearson*, (1888) 128 U. S. 1.

² (1899) 175 U. S. 211.

The Internal Revenue Act of Congress of March 2, 1867,³ provided "that no person shall mix for sale naphtha and illuminating oils, or shall knowingly sell or keep for sale or offer for sale such mixture, or shall sell or offer for sale oil made from petroleum for illuminating purposes, inflammable at less temperature or fire-test than 110 degrees Fahrenheit; and any person so doing shall be held to be guilty of a misdemeanor, and on conviction thereof by indictment or presentment in any court of the United States having competent jurisdiction, shall be punished by fine, etc., and imprisonment." It was urged that the provision was in aid and support of the internal revenue tax imposed on other illuminating oils, analogous to provisions regulating the business of distilling liquors, and the mode of packing various manufactured articles, but in *U. S. v. Dewitt*⁴ the court said that if the prohibition had any relation to taxation at all, it was merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described, and that this consequence was too remote and too uncertain to warrant the court in saying that the prohibition was an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes. And Chief Justice Chase, speaking for the court, further said that "as a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia.

Federal
police
regulation:
applicable
only to fed-
eral places.

³ 14 Stat. at L. 484, c. 169, § 29.

⁴ (1869) 9 Wall. (U. S.) 41.

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V.

Within State limits, it can have no constitutional operation.”

POWER OF THE STATES IN GENERAL.

State general prohibitory law limited to local property.

A State has the power to permit or entirely to forbid the purchase and sale of articles within the State, so long as the legislation does not place any burden or prohibition on sales within the State of articles of commerce imported from foreign countries or from other States while those goods are in the original packages and in the hands of the importers for sale.⁵ A State law prohibiting the sale of any commodity is not absolutely void when it is so general in its terms as to apply to importa-

⁵ A State cannot prohibit the delivery to a purchaser in the State of goods purchased by him in another State. *Sternweis v. Stilsing*, (1890) 52 N. J. L. 517.

A shipment of goods to another State upon an order by telegraph is interstate commerce. *H. Zuberbier Co. v. Harris*, (Tex. Civ. App. 1896) 35 S. W. Rep. 403.

In *Lang v. Lynch*, (1889) 38 Fed. Rep. 489, it was held that a New Hampshire statute making it a criminal offense for any person to solicit orders for spirituous liquors in the State, to be delivered at a place without the State, knowing, or having reasonable cause to believe, that if delivered the same will be transported into the State, and sold in violation of law, is valid.

Goods sold after arrival within the State are not entitled to the protection of the commerce clause. *Duncan v. State*, (1898) 105 Ga. 457; *In re Kinyon*, (1904) 9 Idaho 642; *Muskegon v. Zeeryp*, (1903) 134 Mich. 181; *Western Paper Bag Co. v. Johnson*, (Tex. Civ. App. 1896) 38 S. W. Rep. 364.

A State may prohibit peddling goods from door to door. *Com. v. Gardner*, (1890) 133 Pa. St. 284.

A transaction is not a sale in original packages when it is executory and incomplete until the goods are received, unsealed, and sampled. *Wasserboehr v. Boulrier*, (1892) 84 Me. 165.

Prohibiting the sale of perishable articles at depots and landings has been held not to be within the power of the State. *Spellman v. New Orleans*, (1891) 45 Fed. Rep. 3. But see *State v. Davidson*, (1898) 50 La. Ann. 1297.

tions into the State from without and to permit the seizure of the articles before they have by sale or other transmutation become a part of the common mass of the property of the State, but the operation of the law is limited to property strictly within the jurisdiction of the State.⁶

This right to sell goods in original packages is not only personal, but may be exercised through an agent of the importer.⁷ Nor does the fact that articles are not shipped separately and directly to each individual purchaser, but are sent to an agent of the vendor at their intended destination, who delivers them to the purchasers, deprive the transaction of its character as interstate commerce. It is only that the vendor uses two agencies instead of one in the delivery.⁸

Sales by
agent of
importer.

WHAT CONSTITUTES AN ORIGINAL PACKAGE.

From the apparent necessity for determining the point of time when goods shipped into a State from other States or from foreign countries cease to be under the protection of the Federal Constitution and become subject to the operation of the laws of the State to which they are shipped, the original-package doctrine has been developed. It is Chief Justice Marshall to whom we are under obligation for the adoption of a convenient and expressive term. In the case of *Brown v. Maryland*, to the particular decision of which we refer elsewhere,⁹ the chief justice said that "while remaining the prop-

Source of
doctrine.

⁶ *Leisy v. Hardin*, (1890) 135 U. S. 100.

⁷ *Schollenberger v. Pennsylvania*, (1898) 171 U. S. 1. See also *Wagner v. Meakin*, (1899) 92 Fed. Rep. 76.

⁸ *Caldwell v. North Carolina*, (1903) 187 U. S. 622.

⁹ (1827) 12 Wheat. (U. S.) 419. See *infra*, p. 309.

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V.General
considera-
tions.

erty of the importer, in his warehouse, in the original form or package in which it was imported," an article imported into a State is within the protection of the Constitution from the operation of State laws. Early as was the point decided and important as the question is, we have only a few Supreme Court cases to aid in determining what constitutes an original package. The term is not defined by any statute, and, from the nature of the subject, it may be impossible to define the size or shape of an original package. The size in which the importation is actually made does not govern, but the question is mainly determined by the size of the package in which *bona fide* transactions are carried on between manufacturers and wholesale dealers residing in different States.¹

Packages
of dry
goods.

The clause of Article I, section 10, of the Constitution, provides that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." In *May v. New Orleans*² was involved the validity of certain tax assessments made by the city of New Orleans upon merchandise and stock in trade, which consisted of dry goods imported from foreign countries, upon which duties had been levied by and paid to the government. The goods were put up for sale in packages, a large number of such packages being enclosed in wooden cases or boxes for the purposes of importation, and it was held that the original package was the box or case in which the goods

¹ Where flour, bran, and meal are shipped in sacks in carload lots, the goods in the sacks are the original packages. *Lasater v. Purcell Mill, etc., Co.*, (1899) 22 Tex. Civ. App. 33.

² (1900) 178 U. S. 496.



were shipped and not the packages contained in the box or case.

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In *Leisy v. Hardin*³ quarter barrels, half barrels, and cases of beer were recognized as original packages, and in a number of State and inferior federal court cases the question whether the bottles in which liquors are shipped are original packages has been presented. In those cases a distinction is recognized between a shipment of liquor in bottles packed in boxes, and a shipment of the bottles separately, generally holding that in the one case the box, and in the other each bottle, constitutes the original package.⁴

Packages
of liquors.

Whether the size of a package is material, was the question clearly presented and decided in the case of *Austin v. Tennessee*,⁵ and it was held that a package of three inches in length and one and a half inches in width, containing ten cigarettes, is not an original package. Mr. Justice Brown, delivering the opinion of the court, said that "no doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a *bona fide* package of a particular

Packages
of ciga-
rettes.

³ (1890) 135 U. S. 100.

⁴ See *In re Harmon*, (1890) 43 Fed. Rep. 372; *In re Beine*, (1890) 42 Fed. Rep. 545; *Tinker v. State*, (1891) 96 Ala. 115; *Harrison v. State*, (1890) 91 Ala. 62; *Keith v. State*, (1890) 91 Ala. 2; *Smith v. State*, (1891) 54 Ark. 248; *McGregor v. Cone*, (1898) 104 Iowa 465; *State v. Miller*, (1892) 86 Iowa 638; *State v. Coonan*, (1891) 82 Iowa 400; *State v. Zimmerman*, (1889) 78 Iowa 614; *State v. Bowman*, (1889) 78 Iowa 519; *Grousendorf v. Howat*, (1889) 77 Iowa 187; *Collins v. Hills*, (1889) 77 Iowa 181; *Haley v. State*, (1894) 42 Neb. 556; *State v. Chapman*, (1890) 1 S. Dak. 414.

⁵ (1900) 179 U. S. 343.

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size.” The question was again submitted and the same result reached in *Cook v. Marshall County*.⁶ The only difference between the two cases was that in the *Austin v. Tennessee* case, *supra*, a basket, furnished by the express company, was used to hold the packages, and in the *Cook v. Marshall County* case no basket was used, the packages being shipped absolutely loose, not boxed, baled, wrapped, or covered, nor in any way attached together. On the question of the motive of the shipper in selecting such an unusual method of shipping the cigarettes, the court, again speaking through Mr. Justice Brown, said: “Where the lawfulness of the method used for transporting goods from one State to another is questioned, it may be shown that the intent of the party concerned was not to select the usual and ordinary method of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the State. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause of the Constitution is invoked as a cover for fraudulent dealing, and is no defense to a prosecution under the State law.”

Packages
of oleomargarine.

Ten-pound packages of oleomargarine were held to be original packages in *Schollenberger v. Pennsylvania*.⁷ In this case, which was an indictment and conviction for a violation of a Pennsylvania statute prohibiting the sale of oleomargarine, a special verdict had been found, in which it was

⁶ (1905) 196 U. S. 261.

⁷ (1898) 171 U. S. 1.

stated that the package "was of such form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania." This finding seems to have had much weight with the court, and is particularly referred to in the *Austin v. Tennessee* cigarette case, *supra*, in distinguishing the two cases, on the question of the motive of the shipper.

The principle that the size of the package in which goods may be imported into a State is material was not established without strong dissent. In the *Austin v. Tennessee* case, *supra*, Mr. Justice Brewer wrote a vigorous dissenting opinion, attacking the holding of the court that a package of ten cigarettes is not an original package. Three other justices, Chief Justice Fuller, and Justices Shiras and Peckham, concurred in the dissent. In his dissenting opinion, the learned justice pointed out, as a result of the decision of the court, that the determination of a great constitutional question turns on the shifting opinions of individual judges as to the peculiar facts of a particular case, and that no one could tell from this annunciation where the dividing line is between the power of the States and the power of the nation. Comparing the results reached in the two leading cases, he said: "Apparently, the dividing line as to the size of packages must be somewhere between that of a ten-pound package of oleomargarine and that of a package of ten cigarettes; but where? Must diamonds,

Judicial
dissent
from the
doctrine.

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in order to be within the protecting power of the nation, be carried from State to State in ten-pound packages? If it be said that diamonds are not a subject of police regulation, and that a different rule obtains in reference to them than to matters of police regulation (as might be implied from the scope of the opinion), I can only say that the conclusion seems to me strange. Concretely, it amounts to this: The police power of the State, the power exercised to preserve the health and morals of its citizens, may prevent the importation and sale of a pint of whiskey, but cannot prevent the importation and sale of a barrel; or, in other words, the greater the wrong which is supposed to be done to the morals and health of the community, the less the power of the State to prevent it. That may be constitutional law, but to my mind it lacks the saving element of common sense. I see no logical half-way place between a recognition of the power of the nation to regulate commerce between the States in all things which are the subjects of commerce (in whatever form or manner they may be imported) and a concession of the power of the State to prevent absolutely the importation and sale of articles deemed by it prejudicial to the health or morals of its citizens."

Materiality
of size of
package as
to articles
within
scope of
police
power.

It would seem, at any rate, that the size of the original package has as yet been held to be material only as to articles which may be said to come within the police power. While the cases have left it uncertain as to the size of the package which will hold the articles imported from the operation of a State law while in the original package, and perhaps the question is one impossible of exact definition, the few federal Supreme Court cases which

have required that court to pass upon the point, contain suggestions from which a few rules may be framed:

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1. The package must be capable of being commercially transported from one State to another as a separate importation.
2. The right of the importer to sell does not depend upon whether the original package is suitable for wholesale or retail trade.
3. The fact that Congress, for the purpose of taxation, has prescribed a certain size of package to be separately stamped, is not controlling.
4. The size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States is a material consideration.
5. The motive which actuates the particular method of shipment may be determined from several circumstances:
 - a. From the trifling value of each parcel.
 - b. The absence of an address on each package.
 - c. The fact that many parcels, for the purpose of the shipment, are aggregated.

Some suggestive rules.

TRADEMARKS.

In the *Trade-Mark Cases*,⁸ it was ruled that the original trademark act⁹ was invalid for want of constitutional authority, inasmuch as it was not

General statute invalid.

⁸ (1879) 100 U. S. 82.

⁹ Act of Congress of July 8, 1870, carried forward into §§ 4937-4947, Rev. Stat. U. S., 7 Fed. Stat. Annot. 326.

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V.

confined to the case of a trademark used in foreign or interstate commerce, but had the broad purpose of establishing a universal system of trademark registration for the benefit of all who had already used a trademark, or wished to adopt one in the future, without regard either to the character of the trade to which it was to be applied, whether domestic as to a State or otherwise, or to the residence of the owner.

As a result of this decision, another act entitled "An Act to authorize the registration of trademarks and protect the same,"¹ was passed, and in *Warner v. Searle, etc., Co.*,² after quoting from the new statute, the court said: "Obviously the act was passed in view of the decision that the prior act was unconstitutional, and it is, therefore, strictly limited to lawful commerce with foreign nations and with Indian tribes. It is only the trademark used in such commerce that is admitted to registry, and it can only be infringed when used in that commerce, without right, by another than its owner."

Trademark
as a subject
of com-
merce.

The question of its constitutionality was not decided, however, evidently on the aspect suggested by Mr. Justice Miller in the *Trade-Mark Cases*, *supra*, when he said: "The question, therefore, whether the trademark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided."³

¹ Act of Congress of March 3, 1881, c. 138, 7 Fed. Stat. Annot. 329. The statute is, in terms, limited to "trademarks used in commerce with foreign nations, or with the Indian tribes."

² (1903) 191 U. S. 195.

³ See also *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*,

STATUS OF C. O. D. SHIPMENTS.

Chapter
V.Interstate
shipment
constitutes
interstate
commerce.

Where merchandise is received by a carrier with a duty to collect the price on delivery to the consignee in another State, the shipment constitutes interstate commerce. It matters not that there is a diversity of opinion among the State courts concerning the effect of a C. O. D. shipment, some courts holding that under such a shipment the property is at the risk of the buyer, and, therefore, that delivery is completed when the merchandise reaches the hands of the carrier for transportation; others deciding that the merchandise is at the risk of the seller, and that the sale is not completed until the payment of the price and delivery to the consignee at the point of destination.

In *American Express Co. v. Iowa*,⁴ wherein was raised the question of the operation of the Iowa prohibition law under the Wilson Act,⁵ as to a shipment C. O. D. from the State of Illinois, Mr. Justice White, speaking for the court, said: "Beyond possible question, the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and in doing so to fix by agreement the time when [and] the condition on which the completed title should pass, is beyond question. The shipment from the State of Illinois into the State of Iowa of the merchandise constituted interstate commerce. To sustain, therefore, the ruling of

Judicial ob-
servations.

(1901) 179 U. S. 665, wherein the court refrained from passing upon the constitutionality of the act, the point not having been raised in the lower court.

⁴ (1905) 196 U. S. 133. See also *infra*, p. 308.

⁵ See effect of the "Wilson Act," *infra*, p. 146.

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the court below would require us to decide that the law of Iowa operated in another State so as to invalidate a lawful contract as to interstate commerce made in such other State; and, indeed, would require us to go yet further, and say that, although under the interstate commerce clause a citizen in one State had a right to have merchandise consigned from another State delivered to him in the State to which the shipment was made, yet that such right was so illusory that it only obtained in cases where in a legal sense the merchandise contracted for had been delivered to the consignee at the time and place of shipment." The learned justice further pointed out that to sustain the doctrine of the State court, that wherever merchandise shipped from one State to another is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment, the movement of such merchandise is not interstate commerce, would operate materially to cripple if not to destroy that freedom of commerce between the States which it was the great purpose of the Constitution to promote; it would prevent the citizen of one State from shipping into another unless he assumed the risk; it would subject contracts made by common carriers and valid by the laws of the State where made to the laws of another State; it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied; and, besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order with drafts for the purchase price

attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof.⁶

INTOXICATING LIQUORS.

The doctrine that a State is without power to prohibit the importation of goods from other States was applied to intoxicating liquors, in the case of *Bowman v. Chicago, etc., R. Co.*⁷ An Iowa statute

States without authority to prohibit importation.

⁶ See also *Norfolk, etc., R. Co. v. Sims*, (1903) 191 U. S. 441; *Parker v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1155; *Sedgwick v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 813. But compare *State v. O'Neil*, (1885) 58 Vt. 140; *State v. Intoxicating Liquors*, (1886) 58 Vt. 594.

Upon an indictment against an express company for delivering liquor in violation of law, it appeared that the package was shipped C. O. D.; that the consignee had not ordered it, but offered to take it out when he could get the money to pay for it and the charges; and that it was a week before it was finally delivered. In holding that the defendant was properly convicted, the court, in *Adams Express Co. v. Com.*, (Ky. 1905) 87 S. W. Rep. 1111, said: "A failure, therefore, upon their part to immediately—that is, in a reasonable and customary time—deliver goods shipped in their charge, or their holding of such goods an unreasonable or unusual time, changes their relations at once from a common carrier to that of ordinary warehouseman. In view of this rule, and under the facts of the case at bar, we must conclude that at the time of delivering to Meece the whiskey in question, and in receiving the price paid by the latter therefor, appellant did not sustain to that article of merchandise, or to the consignor or consignee, the relation of common carrier, but merely that of a bailee or warehouseman, for which reason we are unable to see how it was or could have been protected in the transaction by the law of interstate commerce."

⁷ (1888) 125 U. S. 465.

In that case, the *License Cases*, (1847) 5 How. (U. S.) 504; were reviewed. The question in those cases was whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors were valid. The statutes of Massachusetts and Rhode Island had reference to the sale within those States respectively of intoxicating liquor imported from foreign countries,

Chapter
V.Prohibiting
transporta-
tion.

attempted to forbid common carriers from bringing intoxicating liquors into the State of Iowa from another State or Territory without obtaining a certificate required by the laws of Iowa. In holding that the statute was a regulation directly affecting commerce in an essential and vital point, the court, through Mr. Justice Matthews, said that the statute "seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border. It is not one of those local regulations designed to aid and facilitate commerce; it is not an inspection law to secure the due quality and measure of a commodity; it is not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it is not a regulation confined to the purely internal and domestic commerce of the State; it is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the State."

Prohibiting
sale of im-
ported
liquors.

Another feature of the Iowa prohibitory law, which prohibited the sale of intoxicating liquors except by persons holding permits authorizing them to sell and dispense liquors for pharmaceutical and medicinal purposes, and alcohol for specified chemical purposes, and wine for sacramental purposes, but for no other purposes whatever, came in for

but not sold or offered for sale within the State by the importer in original packages. The statute of New Hampshire, however, applied to intoxicating liquor imported from another State, and the decision in that case upheld its validity in reference to the disposition by sale or otherwise of the intoxicating liquor after it had been brought into the State. This last case was in effect overruled by the *Bowman v. Chicago, etc.*, R. Co.'s case.

judicial condemnation, in *Leisy v. Hardin*,⁸ as applied to liquors imported from another State and held for sale in the original packages; wherein Chief Justice Fuller, referring to cases sustaining the power of the State to control manufacture and sale within the State, said in the opinion written for the court: "These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government; but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void."⁹

⁸ (1890) 135 U. S. 100.

⁹ Followed by *Lyng v. Michigan*, (1890) 135 U. S. 161. See *Kidd v. Pearson*, (1888) 128 U. S. 1, referred to *supra*, p. 111.

See also *Ex p. Jervy*, (1895) 66 Fed. Rep. 957; *Jervy v. The Carolina*, (1895) 66 Fed. Rep. 1013; *State v. Intoxicating Liquors*, (1900) 94 Me. 335.

The fact that the shipper is a resident of the State and that the contract was executed in the State, does not take a transaction out of interstate commerce and make it a State transaction when the shipper's place of business is in another State and the products are there manufactured and shipped. *Sloman v. William D. C. Moebis Co.*, (1905) 139 Mich. 334.

Liquor which has been manufactured by the citizens of a State in the State, sent out of the State, and then shipped back into the State for the express purpose of evading the prohibition laws of the State, never became a subject of interstate commerce. *Crigler v. Com.*, (Ky. 1905) 87 S. W. Rep. 276.

The application of the doctrine that a State is without power to prohibit the importation of goods from other States has been modified

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CIGARETTES.

In the case of cigarettes, a statute of Tennessee provided "that it shall be a misdemeanor for any person, firm, or corporation to sell, offer to sell, or to bring into the State for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same." Upon sustaining a conviction for a sale of cigarettes in violation of the statute, the State Supreme Court placed its decision upon two grounds: First, that cigarettes are not legitimate articles of commerce; second, that the sale shown to have been made was not the sale of an original package in the true commercial sense.

The Supreme Court of the United States, in *Austin v. Tennessee*,¹ affirmed the judgment of the State court upon the second ground stated, which is discussed in another part of this work,² but as to the first ground, that cigarettes are not legitimate articles of commerce, Mr. Justice Brown, writing the opinion of the court, said: "We are not prepared to fully indorse the opinion of that court upon the first point. Whatever product has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce although it may to a certain extent be within the police power of the States. Of this class of cases is tobacco.

Cigarettes
as legiti-
mate
articles of
commerce.

by federal statutes, as applied to intoxicating liquors and imitation dairy products. See *infra*, p. 143.

¹ (1900) 179 U. S. 343.

² See *supra*, p. 123.

From the first settlement of the colony of Virginia to the present day tobacco has been one of the most profitable and important products of agriculture and commerce, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of opinion that it cannot be classed with diseased cattle or meats, decayed fruit, or other articles the use of which is a menace to the health of the entire community. Congress, too, has recognized tobacco in its various forms as a legitimate article of commerce by requiring licenses to be taken for its manufacture and sale, imposing a revenue tax upon each package of cigarettes put upon the market, and by making express regulations for their manufacture and sale, their exportation and importation." And the statute was held valid as to sales by the importer not in original packages.

As applied, however, to sales in original packages of cigarettes manufactured in other States, State prohibitory laws are invalid.³

Prohibiting
sales in
original
packages.

OLEOMARGARINE.

A further application of these principles was made in the case of the attempted regulation or prohibition of the sale of oleomargarine. Fully recognizing the power of a State to prevent the sale of an adulterated article, Mr. Justice Peckham, in *Schollenberger v. Pennsylvania*,⁴ said: "But in

³ *Sawrie v. Tennessee*, (1897) 82 Fed. Rep. 615; *Iowa v. McGregor*, (1896) 76 Fed. Rep. 956.

⁴ (1898) 171 U. S. 1.

Chapter
V.

A recognized
article of
commerce.

carrying out its purposes the State cannot absolutely prohibit the introduction within the State of an article of commerce like pure oleomargarine. It has ceased to be what counsel for the Commonwealth has termed it, a newly discovered food product. An article that has been openly manufactured for nearly a quarter of a century, where the ingredients of the pure article are perfectly well known and have been known for a number of years, and where the general process of manufacture has been known for an equal period, cannot truthfully be said to be a newly discovered product within the proper meaning of the term as here used. The time when a newly discovered article ceases to be such cannot always be definitely stated, but all will admit that there does come a period when the article cannot be so described. In this particular case we have no difficulty in holding that oleomargarine has so far ceased to be a newly discovered article as that its nature, mode of manufacture, ingredients, and effect upon the health are and have been for many years as well known as almost any article of food in daily use. Therefore if we admit that a newly discovered article of food might be wholly prohibited from being introduced within the limits of a State, while its properties, whether healthful or not, were still unknown, or in regard to which there might still be doubt, yet this is not the case with oleomargarine. If properly and honestly manufactured it is conceded to be a healthful and nutritious article of food. The fact that it may be adulterated does not afford a foundation to absolutely prohibit its introduction into the State. Although the adulterated article may possibly in some cases be injurious to

Prohibition
of introduc-
tion of
newly dis-
covered
article of
food.

the health of the public, yet that does not furnish a justification for an absolute prohibition.”⁵

In accordance with this view, in *Collins v. New Hampshire*,⁶ as to a statute prohibiting the sale of oleomargarine as a substitute for butter unless it is of a pink color, the learned justice further said: “In a case like this it is entirely plain that if the State has not the power to absolutely prohibit the sale of an article of commerce like oleomargarine in its pure state, it has no power to provide that such article shall be colored, or rather discolored, by adding a foreign substance to it in the manner described in the statute. Pink is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. . . . If this provision for coloring the article were a legal condition, a legislature could not be limited to pink in its choice of colors. The legislative fancy or taste would be boundless. It might equally as well provide that it should be colored blue or red or black. Nor do we see that it would be limited to the use of coloring matter. It might, instead of that, provide that the article should only be sold if mixed with some other article which, while not deleterious to health, would nevertheless give out a most offensive smell.”⁷

Requiring
oleomarga-
rine to be
colored
pink.

It is within the power of a State, nevertheless, to exclude from its markets any compound manu-

⁵ See also *In re Brundage*, (1899) 96 Fed. Rep. 963, *reversed* on other grounds in *Minnesota v. Brundage*, (1901) 180 U. S. 499; *Ex p. Scott*, (1895) 66 Fed. Rep. 45; *In re Worthen*, (1891) 58 Fed. Rep. 467; *State v. Bruce*, (1904) 55 W. Va. 384; *In re McAllister*, (1892) 51 Fed. Rep. 282; *In re Gooch*, (1890) 44 Fed. Rep. 276.

⁶ (1898) 171 U. S. 30.

⁷ See also *Armour Packing Co. v. Snyder*, (1897) 84 Fed. Rep. 136.

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V.

Excluding
article arti-
ficially
colored or
adulterated

factured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they do not intend to buy. And in *Plumley v. Massachusetts*,⁸ it was held that a statute preventing the sale of oleomargarine in imitation of yellow butter produced from pure unadulterated milk or cream of the same, and containing a proviso that nothing therein should be "construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter," was valid. Attention was called in the opinion of the court to the fact that the statute did not prohibit the manufacture or sale of all oleomargarine, but only of such as was colored in imitation of yellow butter produced from unadulterated milk or cream of such milk. If free from coloration or ingredient that caused it to look like butter, the right to sell it in a separate and distinct form and in such manner as would advise the consumer of its real character was neither restricted nor prohibited. The court held that under the statute the party was only forbidden to practice in such matters a fraud upon the general public; that the statute sought to suppress false pretenses and to promote fair dealing in the sale of an article of food, and that it compelled the sale of oleomargarine for what it really was by preventing its sale for what it was not; and that the term "commerce among the States" does not mean a recognition of a right to

Prohibiting
sale when
colored in
imitation of
butter.

⁸ (1894) 155 U. S. 461.

practice a fraud upon the public in the sale of an article even if it has become the subject of trade in different parts of the country.⁹

COFFEE.

In the exercise of its police powers, a State has the right to enact such legislation as it may deem proper, even in regard to articles of interstate and foreign commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the State. The State of New York enacted a statute declaring that "no person shall within the State manufacture, produce, compound, brew, distill, have, sell, or offer for sale any adulterated food or drug. An article shall be deemed to be adulterated within the meaning of this Act: . . . in the case of food, . . . (6) if it be colored or coated, or polished, or powdered, whereby damage is concealed, or it is made to appear better than it really is, or of greater value."¹ An Act of Congress, "providing for the inspection of meats for exportation, prohibiting the importation of adulterated articles of food or drink, and author-

Regula-
tions pre-
venting
fraud or
deception.

⁹ See also *In re Scheitlin*, (1900) 99 Fed. Rep. 272; *State v. Rogers*, (1901) 95 Me. 94; *In re Brosnahan*, (1883) 18 Fed. Rep. 62; *Waterbury v. Newton*, (1888) 50 N. J. L. 534, as to oleomargarine colored with annatto; *State v. Addington*, (1882) 77 Mo. 110; *McCann v. Com.*, (1901) 198 Pa. St. 509.

A statute requiring the packages in which process or renovated butter is sold to be plainly marked "Renovated Butter," does not conflict with the commerce clause, but is an exercise of the police power. *Hathaway v. McDonald*, (1902) 27 Wash. 659.

¹ Laws of the State of New York of 1893, c. 661, § 41, being c. 25 of the General Laws of the State of New York.

Chapter
V.

izing the President to make proclamation in certain cases," declares "that it shall be unlawful to import into the United States any adulterated or unwholesome food or drug, or any vinous, spirituous, or malt liquors, adulterated or mixed with any poisonous or noxious chemical, drug, or other ingredient injurious to health."²

Prohibiting
sale of
coated and
colored
coffee.

In *Crossman v. Lurman*³ the validity of the State statute was questioned as applied to coffee imported from a foreign country, which was of a low grade, containing many poor, withered, and black beans, and was so coated and colored as to conceal the damaged portions, or to make it to appear better than it really was, or of greater value, to the ordinary untrained observer. Upon three aspects the statute was held to be valid. In its enactment the State but exerted its reserved police power to legislate for the protection of the health and safety of the community and to provide against deception or fraud; the statute did not cease to be operative as regards food products imported into the United States through the channels of foreign commerce after the enactment by Congress of the federal statute above referred to; and the fact, if it could be established, that there was a demand in some portions of the country for artificially colored coffee, and consequently that such commodity was a recognized article of commerce, did not give a right to deal in it protected by the commerce clause, and uncontrolled by State law.⁴

² Act of August 30, 1890, c. 839, § 2, 3 Fed. Stat. Annot. 136.

³ (1904) 192 U. S. 189.

⁴ See also *Arbuckle v. Blackburn*, (1903) 191 U. S. 405, *dismissing* the appeal from (1902) 113 Fed. Rep. 616.

STOCKYARDS.

Chapter
V.

Upon a bill in equity to enjoin the commission of alleged violations of the Sherman Anti-Trust Act,⁵ the bill charged a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live-stock markets of the different States, to bid up prices for a few days in order to induce the cattle men to send their stock to these stockyards, to fix prices at which they would sell, and to that end to restrict shipment of meat when necessary, to establish a uniform rule of credit to dealers and to keep a blacklist, to make uniform and improper charges for cartage, and, finally, to get less than lawful rates from the railroads to the exclusion of competitors. In the opinion of the court,⁶ written by Mr. Justice Holmes, holding that such a combination was within the meaning of the statute, the learned justice said: "When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle."

Combina-
tion of
meat deal-
ers to con-
trol the
market.

There is a distinction between such a business and that carried on by members of a live-stock ex-

⁵ Act of Congress of July 2, 1890, c. 647, 7 Fed. Stat. Annot. 336.

⁶ *Swift v. U. S.*, (1905) 196 U. S. 375.

Chapter
V.

Business
carried on
by mem-
bers of an
exchange.

change as brokers, buying and selling for others. In *Hopkins v. U. S.*⁷ it appeared that the Kansas City live-stock exchange was carried on and conducted by a board of directors at the Kansas City stockyards, which were situated partly in Kansas City in the State of Missouri, and partly in Kansas City in the State of Kansas, the building owned by the stockyards company being located one-half within the State of Missouri and the other half in the State of Kansas; and half the members of the exchange had offices and transacted business in the stockyards and in that part of the building which was within the State of Kansas, and the other half in that part of the building which was in the State of Missouri; substantially all the business transacted in the matter of receiving, buying, selling, and handling their live stock at Kansas City was carried on by the members of the exchange as commission merchants, and large numbers of the live stock were shipped from other States; when this stock was received at the stockyards it was sold by the members of the exchange to the various packing houses situated at Kansas City, Mo., and Kansas City, Kans., and it was sold for shipment to the various other markets, particularly Chicago, St. Louis, and New York. The ordinary regulations governing the conduct of such a business were held to be rules and charges for the facilities provided for the transaction of such commerce, and not to constitute violations of the Anti-Trust Act, because it did not appear that the parties were engaged in interstate commerce.⁸

⁷ (1898) 171 U. S. 578.

⁸ See *Anderson v. U. S.*, (1898) 171 U. S. 604.

MAKING IMPORTATIONS SUBJECT TO STATE LAWS —
WILSON ACT.

Chapter
V.

Intoxicat-
ing liquors
and imita-
tion dairy
products.

In the cases of intoxicating liquors and of imitation dairy products, Acts have been passed by Congress subjecting those articles, when transported into any State or Territory, to the operation of the laws of such State or Territory enacted in the exercise of its police powers, while such articles are in the original packages.⁹

The Act of August 8, 1890, generally known as the Wilson Act, was passed in consequence of the decision in the case of *Leisy v. Hardin*,¹ which held,

Wilson Act.

⁹ The Act of August 8, 1890, c. 728, 3 Fed. Stat. Annot. 853, provides: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The Act of May 9, 1902, c. 784, § 1, 3 Fed. Stat. Annot. 127, provides: "That all articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or Territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." See *U. S. v. Green*, (1905) 137 Fed. Rep. 179.

¹ (1890) 135 U. S. 100, wherein Chief Justice Fuller said: "Undoubtedly it is for the legislative branch of the State govern-

Chapter
V.

as has been heretofore stated, that the right to import intoxicating liquors from one State into another includes, by necessary implication, the right to sell in the original package at the place where the importation terminates.

One of the latest cases to construe and apply the Act of 1890 is that of *Pabst Brewing Co. v. Crenshaw*.² In the course of the opinion in that case Mr. Justice White gives a review of the previous cases in which its validity and purpose were determined and its relation to particular State laws considered. The learned justice said:

Judicial review of cases under the Wilson Act.

“The scope of this Act and the power of Congress to adopt it were passed upon in *In re Rahrer*, (1891) 140 U. S. 545. The scope of the Act was thus stated (p. 560):

“Congress has now spoken and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature.’

Statute valid.

“It was decided that although the Act had the effect thus stated it was not repugnant to the Constitution of the United States, the court saying (p. 562):

ments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measures a State may properly adopt as appropriate or needful for the protection of the public morals, the public health, or the public safety; but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.”

² (1905) 198 U. S. 17.

“ ‘No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.’

“ In *Rhodes v. Iowa*, (1898) 170 U. S. 412, the purport of the Act was again passed upon. Reiterating the ruling made in the *Rahrer* case, it was decided that whilst the Wilson Act caused liquors shipped into Iowa from another State to be divested of their character as articles of interstate commerce after their delivery in Iowa to the person to whom consigned, nevertheless the Act did not authorize the laws of Iowa to be applied to such merchandise whilst in transit from another State and before delivery in Iowa.

Not appli-
cable to
liquor
while in
transit.

“ In *Vance v. W. A. Vandercook Co.*, (1898) 170 U. S. 438, the operation of a liquor law of South Carolina was considered. By the Act in question the State of South Carolina took exclusive charge of the sale of liquor within the State, appointed its agents to sell the same, and empowered them to purchase the liquor, which was to be brought into the State for sale. The fact was that by the Act in question the State of South Carolina, instead of forbidding the traffic in liquor, authorized it, and engaged in the liquor business for its own account, using it as a source of revenue. The Act in addition affixed prerequisite conditions to the shipment into South Carolina from other States of liquor to a consumer who had purchased it for his own use and not for sale. Considering the Wilson Act and the previous decisions applying it, it was decided that the South Carolina law, in so far as it took

South Car-
olina Dis-
pensary
Law.

Chapter
V.

Right to
import for
individual
consump-
tion.

charge in behalf of the State of the sale of liquor within the State and made such sale a source of revenue, was not an interference with interstate commerce. In so far, however, as the State law imposed burdens on the right to ship liquor from another State to a resident of South Carolina intended for his own use and not for sale within the State, the law was held to be repugnant to the Constitution, because the Wilson Act, whilst it delegated to the State plenary power to regulate the sale of liquors in South Carolina shipped into the State from other States, did not recognize the right of a State to prevent an individual from ordering liquors from outside of the State of his residence for his own consumption and not for sale.

“ Quite recently, at this term, in *American Express Co. v. Iowa*, (1905) 196 U. S. 133, and *Adams Express Co. v. Iowa*, (1905) 196 U. S. 147, the construction affixed to the Wilson Act in the previous cases was applied, and the power of the State of Iowa to control the sale of liquors shipped from another State into that State, after their delivery to the consignee, was upheld.”

State in
inspection
law.

And in that case of *Pabst Brewing Co. v. Crenshaw*, *supra*, it was held that a Missouri statute, creating the office of inspector of beer and malt liquors and providing for the inspection of beer and malt liquors sold in the State, and authorizing the collection of an inspection fee imposed upon beer or other malt liquors when shipped from other States into Missouri, after its delivery within that State to the consignee, and when held for sale for consumption in Missouri or for shipment to other States, was valid under the Wilson Act. Four of the justices dissented, mainly on the ground that as the Missouri law was denominated in its text an inspec-

tion law, and did not provide an adequate inspection, and besides imposed a burden beyond the cost of inspection, the law was repugnant to the Constitution of the United States when tested by previous decisions determining when particular inspection laws amount to a regulation of commerce, as in the cases of *Atlantic, etc., Tel. Co. v. Philadelphia*,³ and *Postal Tel.-Cable Co. v. New Hope*,⁴ but the court, in the prevailing opinion, said: "These cases, however, simply considered State laws which operated upon interstate commerce. To apply them to the Missouri law necessarily involves deciding that the malt liquors to which that law applied had not ceased to be articles of interstate commerce; and, therefore, again merely disregards the Wilson Act and the decisions of this court concerning it. Indeed, the whole argument upon which the entire case of the plaintiff in error proceeds rests upon this fallacious assumption, since it admits on the one hand the validity of the Wilson Law, and yet seeks to take this case out of the reach of its provisions by distinctions which have no foundation in reason, unless it be that that law is to be disregarded or held to be unconstitutional." ⁵

³ (1903) 190 U. S. 160.

⁴ (1904) 192 U. S. 55.

⁵ It has been held, since the adoption by Congress of the Act of 1890, that State statutes prohibiting the soliciting of orders for liquor to be shipped into the State to the purchaser are invalid, as such laws are not police regulations within the meaning of the Act of Congress. *In re Bergen*, (1900) 115 Fed. Rep. 339; *Ex p. Loeb*, (1896) 72 Fed. Rep. 657; *State v. Hickox*, (1902) 64 Kan. 650.

A statute providing that "no action shall be maintained upon any claim or demand, promissory note or other security, contracted or given for intoxicating liquors sold in violation of this chapter, or for any such liquors purchased out of the State with intention to sell the same or any part thereof in violation thereof," is valid as to the purchase of liquors outside the State. *Corbin v. Houlehan*, (1905) 100 Me. 246.

CHAPTER VI.

TRANSPORTATION OF PERSONS AND PROPERTY GENERALLY.

INTERSTATE AND FOREIGN TRANSPORTATION.

Chapter
VI.

Paramount
power of
Congress.

TRANSPORTATION of persons and property, by land or water, between different States and between the United States and foreign countries, constitutes interstate and foreign commerce.¹ Conveyance from or to a point in one State to or from some point in another State is as much interstate commerce as that which passes entirely through a State from its point of original shipment to its destination.² Such regulations as Congress may lawfully prescribe or authorize, and which may properly be deemed in regulation of interstate commerce,

¹ Philadelphia, etc., Steamship Co. v. Pennsylvania, (1887) 122 U. S. 326.

"Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." *Per* Mr. Justice Holmes, in *Hanley v. Kansas City Southern R. Co.*, (1903) 187 U. S. 617.

² *Fargo v. Michigan*, (1887) 121 U. S. 230.

State statutes prohibiting the transportation of natural gas to points outside the State are invalid. *Manufacturers Gas, etc., Co. v. Indiana Natural Gas, etc., Co.*, (1900) 155 Ind. 545; *Consumers' Gas Trust Co. v. Harless*, (1891) 131 Ind. 446; *State v. Indiana, etc., Oil, etc., Co.*, (1889) 120 Ind. 575.

Prohibiting the use of more than the natural pressure in the transportation of natural gas was held to be valid in *Jamieson v. Indiana Natural Gas, etc., Co.*, (1891) 128 Ind. 555. But *contra*, *Benedict v. Columbus Constr. Co.*, (1891) 49 N. J. Eq. 23.

are paramount,³ and the power to regulate or forbid the sale of a commodity after it has been brought into the State does not carry with it the right and power to prevent its introduction by transportation from another State.⁴

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When the entire subject of transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not.⁵

Transportation of live stock.

TRANSPORTATION BETWEEN PLACES IN THE SAME STATE PASSING OUTSIDE THE STATE.

Continuous transportation between points in the same State, when part of the route is outside of the State, and over the high seas or over the territory of an adjoining State, is not domestic commerce.

Not domestic commerce.

Respecting vessels, the question was presented in *Lord v. Goodall, etc., Steamship Co.*,⁶ as to the power of Congress to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and pas-

Navigating high seas.

³ Reid v. Colorado, (1902) 187 U. S. 137.

⁴ Bowman v. Chicago, etc., R. Co., (1888) 125 U. S. 465.

See *supra*, p. 143.

⁵ Reid v. Colorado, (1902) 187 U. S. 137. See also U. S. v. Boston, etc., R. Co., (1883) 15 Fed. Rep. 209; Crawford v. Southern R. Co., (1899) 56 S. Car. 136; Gulf, etc., R. Co. v. Gray, (Tex. Civ. App. 1894) 24 S. W. Rep. 837.

A State statute requiring railroads to furnish double-decked cars for the shipment of sheep was held to be invalid as a regulation of commerce, as applied to interstate shipments. Stanley v. Wabash, etc., R. Co., (1890) 100 Mo. 435.

⁶ (1880) 102 U. S. 541.

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sengers between ports and places in the same State. Finding ample authority in Congress over the subject, Chief Justice Waite, speaking for the court, said: "While on the ocean [the ship's] national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress."⁷

Distinction
between
power to
tax and to
regulate
rates.

So far as railroads are concerned, a distinction has been made as to the power of a State over transportation from and to points within the State passing outside the State, between the right to tax and the power to regulate the rates on such transporta-

⁷ See further *infra*, as to limitation of vessel-owner's liability, p. 221.

Vessels are not engaged in domestic commerce when their voyages require them to navigate the ocean beyond the marine league. *Pacific Coast Steam-Ship Co. v. Railroad Com'rs*, (1883) 18 Fed. Rep. 10.

It may be inferred from the route pursued by the boat and the connection between the boat and railroads at each end of her route that the boat is to some extent engaged in interstate commerce — to what extent is immaterial. *The Hazel Kirke*, (1885) 25 Fed. Rep. 601.

tion. In *Lehigh Valley R. Co. v. Pennsylvania*⁸ the right of a State to tax the receipts on transportation between two points within the State when the route is partly over an adjoining State, was affirmed, as the tax was determined in respect of receipts for the proportion of the transportation within the State, Chief Justice Fuller saying: "While interstate commerce cannot be regulated by a State by the laying of taxes thereon, in any form, yet whenever the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the distinction will be acted upon by the courts, and the State permitted to collect that arising upon commerce solely within its own territory." But in respect to what may be understood as regulation, as distinguished from taxation, the doctrine of the separability of interstate and domestic commerce is not recognized. In *Hanley v. Kansas City Southern R. Co.*⁹ this distinction was clearly made, and the right of a State to regulate the rates on such transportation was denied. A State may levy a proportioned tax in the case of commerce admitted to be interstate, but when a rate is established it must be established as a whole.

The first rule stated has been further applied recently¹ in an attempt to apply the provisions of the Sherman Anti-Trust Act to the case of a contract of sale of vessels, in which the vendors agreed that for a specific term they would not be engaged in running or operating or in any way be interested in any freight or passenger packet business between

Transportation over
boundary
river.

⁸ (1892) 145 U. S. 192.

⁹ (1903) 187 U. S. 617.

¹ *Cincinnati, etc., Packet Co. v. Bay*, (1906) 200 U. S. 179.

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certain places within the same State, on a river forming the boundary between that and another State. While it was held that such a contract is not in restraint of trade within the meaning of the statute, the point decided, which is of interest here, was that the transportation over a boundary river, between two points in the same State, and passing over the soil of the other State, is not interstate commerce. Mr. Justice Holmes, writing the opinion of the court, said that it would be an extravagant consequence to draw from *Hanley v. Kansas City Southern R. Co.*, *supra*, a case of a State attempting to fix rates over a railroad route passing outside its limits, that the contract in this case was within the Sherman Act.

DURATION OF FEDERAL PROTECTION FROM OPERATION OF
STATE LAWS.

Property becomes the subject of interstate and foreign commerce only when actually in transit from one State to another or to a foreign country.²

Though goods are purchased³ or manufactured for export, they are not exempt from the operation

Goods intended for export.

² *Kelley v. Rhoads*, (1903) 188 U. S. 1.

³ *Myers v. Baltimore County*, (1896) 83 Md. 385; *Carrier v. Gordon*, (1871) 21 Ohio St. 605.

If cotton, intended for export, is entered with a common carrier which refuses to give a foreign bill of lading and gives local bills of lading for transportation over its line within the State, and the shipper negotiates with connecting lines for the exchange of the local bills of lading for foreign bills and for the completion of the foreign transportation, the cotton is not subject to State regulations regarding compressing cotton. *State v. International, etc., R. Co.*, (1903) 31 Tex. Civ. App. 219.

On the other hand, in *State v. San Antonio, etc., R. Co.*, (1903) 32 Tex. Civ. App. 58, it was held, that when cotton was purchased at different points in the State for export, collecting it at a central

of State laws. In *Kidd v. Pearson*,⁴ wherein the question was discussed whether the right of a State to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the State and belonged to commerce, and that, therefore, the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, did not constitute an unauthorized interference with the right of Congress to regulate commerce. And in *Coe v. Errol*⁵ logs which had been cut in the State of Maine, and others which had been cut in the State of New Hampshire, were floated in course of transit down a stream in New Hampshire to the town of Errol, in the latter State; thence to be floated down the Androscoggin river to the State of Maine. The town of Errol assessed upon the property a county, town, school, and highway tax. The tax was sustained by the Supreme Court of New Hampshire as to the logs cut in that State, and abated as to those cut in Maine. In affirming the judgment of the State court, Mr. Justice Bradley, delivering the opinion of the court, said: "There must be a point of time when they [goods intended for export] cease to be governed exclusively by the domestic law and begin

point for classification and grading, with the shifting of the bales from one bill of lading to another, did not transform the foreign shipments into local ones.

⁴ (1888) 128 U. S. 1. See also *People v. Niagara Fruit Co.*, (1903) 173 N. Y. 629, *affirming* (1902) 75 N. Y. App. Div. 11.

⁵ (1886) 116 U. S. 517.

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ment of
final move-
ment.Commit-
ment to
common
carrier.While in
possession
of domestic
carrier.

to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.”⁶

So that this movement of interstate or foreign commerce begins when the articles have been shipped or started for transportation from a State, and though a vessel, on which goods destined for other States are being carried, plies entirely within the limits of a State and does not run in connection with, or in continuation of, any line of vessels or railway leading to other States, the goods, being in possession of a common carrier and in the course of transit to another State, are subjects of interstate

⁶ See also *Diamond Match Co. v. Ontonagon*, (1903) 188 U. S. 82.

commerce,⁷ but the carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of the interstate journey.⁸

Temporary detention in transit does not subject property to the operation of State law.⁹ Just as goods are within federal protection as soon as they are actually delivered to a common carrier, so they continue under that protection until they have been delivered to the consignee. Moving goods shipped from a point without the State, from a platform at the depot to the freight warehouse, is a part of interstate transportation.¹ And when cars containing

While temporarily detained in transit.

⁷ The *Daniel Ball*, (1870) 10 Wall. (U. S.) 557, Mr. Justice Field saying for the court: "The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation it is subject to the regulation of Congress."

Interstate commerce begins by the actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another State. *U. S. v. Boyer*, (1898) 85 Fed. Rep. 425; *In re Greene*, (1892) 52 Fed. Rep. 104; *Bennett v. American Express Co.*, (1891) 83 Me. 236; *Houston Direct Nav. Co. v. Insurance Co. of North America*, (1895) 89 Tex. 1.

⁸ *Coe v. Errol*, (1886) 116 U. S. 517.

A distinction may perhaps be here made between the rule that goods carried by a domestic connecting carrier in the course of interstate transportation are within the protection of the commerce clause, and the principle, if it be a sound one, that Congress cannot subject a carrier, operating wholly within a State, to federal regulations unless such carrier engages in interstate commerce by making an arrangement with shippers or connecting carriers for continuous carriage. See *infra*, p. 158.

⁹ A dining car is under the control of Congress while in the act of making its interstate journey, and is equally so when waiting for the train to be made up for the next trip. *Johnson v. Southern Pac. R. Co.*, (1904) 196 U. S. 1. See also *Delaware, etc., Canal Co. v. Com.*, (Pa. 1888) 17 Atl. Rep. 175.

¹ *Rhodes v. Iowa*, (1898) 170 U. S. 412.

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freight have not been delivered to the consignee, but remain on the tracks of the railway company in the condition in which they have been brought into the State, the interstate transportation of the property has not been completed.²

When
goods be-
come sub-
ject to State
laws.

As soon as goods arrive in a State and become part of its general mass of property, they become amenable to State laws,³ and this time is said to arrive when the original package is no longer such in the hands of the importer, that is, when he has either sold the goods in the original package or the original package has been broken up in his hands.⁴

Coal barge
cases.

The coal barge cases furnish peculiar illustrations of this rule. In *Brown v. Houston*,⁵ coal mined in Pennsylvania was from that State imported into the State of Louisiana. While afloat in the Mississippi river, in the parish of New Orleans, it was offered for sale, and it was held that it had become part of the property of the State and was subject to State taxation. It was also so held in *Pittsburg, etc., Coal Co. v. Bates*,⁶ wherein the coal had not reached its exact destination, and, to accommodate the exigencies of the owner's business, the barges, about one hundred in number, were stopped and

² *McNeill v. Southern R. Co.*, (1906) 202 U. S. 543.

³ *Brown v. Houston*, (1885) 114 U. S. 622.

⁴ *Leisy v. Hardin*, (1890) 135 U. S. 100.

To goods imported from foreign States this same principle applies, but there is a distinction between the power of the State to tax goods as property which have come from other States, and goods imported from foreign countries, a distinction created by the positive prohibition of the clause in Article I, § 10, declaring that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports." The question is discussed in a subsequent part of this work under the power of the State to tax goods in original packages. See *infra*, p. 292.

⁵ (1885) 114 U. S. 622.

⁶ (1895) 156 U. S. 577.

moored in the Mississippi river at a convenient place about nine miles above the port of Baton Rouge.

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But in becoming amenable to State law, it is only to such laws as are applicable to property generally; the goods cannot be discriminated against on account of their having come from another State.⁷

Must be
absence of
discrimina-
tion.

From these propositions it may be stated that there may be an interior movement of property which does not constitute interstate commerce, though property be destined to or come from another State; in the one case, until it be shipped or started on its final journey, it is subject to the operation of State law, and in the other case, though it have not reached its place of disembarkation or delivery, it may become subject to the operation of that law, but only in this latter event, probably, under such circumstances as are suggested by the cases of *Brown v. Houston*, and *Pittsburg, etc., Coal Co. v. Bates, supra*.⁸

⁷ *Howe Mach. Co. v. Gage*, (1879) 100 U. S. 676; *Welton v. Missouri*, (1875) 91 U. S. 275; *Robbins v. Shelby County Taxing Dist.*, (1887) 120 U. S. 489. See *infra*, pp. 252, 315.

⁸ *Diamond Match Co. v. Ontonagon*, (1903) 188 U. S. 82.

CHAPTER VII.

RAILROAD AND EXPRESS COMPANIES.

GENERAL POWER OF CONGRESS OVER INTERSTATE CARRIERS.

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Power of
Congress
paramount.

“THE power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted,” said Mr. Justice White, in *New York, etc., R. Co. v. Interstate Commerce Commission*.¹ So that all that may be said respecting the power of the States to make regulations affecting carriers engaged in interstate and foreign commerce must be understood as relating to the exercise of a police power, and subject always to the superior right of Congress to control such commerce. Not only may Congress subject every interstate carrier to its regulations, but under this power to regulate the interstate transportation of persons and property, Congress may authorize the construction of railroads,² and may make grants of land for rights of way, even to State corporations.³

Power of
Congress
over rail-
road wholly
intrastate.

It may be that a State railroad corporation which operates a railroad wholly within the State may not be legally compelled to submit itself to the provisions of an Act of Congress, even when carrying,

¹ (1906) 200 U. S. 361.

² *California v. Central Pac. R. Co.*, (1888) 127 U. S. 1.

³ *Cherokee Nation v. Southern Kansas R. Co.*, (1890) 135 U. S.

between points in the State, freight that has been brought from or that is intended for another State.⁴ But when such a railroad voluntarily engages as a common carrier in interstate commerce by making an arrangement for a continuous carriage or shipment of goods and merchandise, it is subject, as far as such traffic is concerned, to the regulations and provisions of the Act of Congress.⁵

GENERAL POWER OF THE STATES OVER CARRIERS.

It will be noticed that the discussion throughout this chapter recognizes generally the power of the States to adopt regulations respecting carriers as instrumentalities of commerce, in the absence of federal regulations on the subject. It has been held that State statutes imposing a penalty for the refusal of a railroad company to receive freight tendered for transportation,⁶ for failure to ship freight

Subordinate power to regulate carriers as instrumentalities of commerce.

⁴ *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, (1896) 162 U. S. 184.

⁵ *Interstate Commerce Commission v. Detroit, etc., R. Co.*, (1897) 167 U. S. 633.

A railroad existing under the laws of two States and having its main lines and branches wholly within those States, which, by virtue of its connections at several points with railroads of other corporations, and of traffic contracts and agreements, has become a link in a through line of road, over which freight and passengers are carried into and out of other States, is, as to those other States, engaged in interstate commerce. *Norfolk, etc., R. Co. v. Pennsylvania*, (1890) 136 U. S. 114.

By the employment of several agencies in interstate transportation each agency is engaged in interstate commerce, and the transportation of goods to forwarding agents at points within the State, where the goods are not unloaded, bulk is not broken, nor are the cars delayed to any extent, but the cars are at once transferred to other carriers to be forwarded to their ultimate destination outside the State, constitutes interstate commerce and is not subject to State regulation. *Cutting v. Florida R., etc., Co.*, (1891) 46 Fed. Rep. 641.

⁶ *Currie v. Raleigh, etc., Air Line R. Co.*, (1904) 135 N. Car. 535.

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within a prescribed time,⁷ or requiring payment of or refusal to pay a claim for lost or damaged goods within a certain time, are valid,⁸ but statutes requiring freight to be shipped over a route designated by the shipper,⁹ or authorizing service of attachment process on a freight car loaded with interstate freight, have been declared to be interferences with commerce.¹

In a former part of this work it has been shown that a statute, the material requirement of which is that when the shipper of freight shall make a requisition in writing for a number of cars to be furnished at any point indicated within a certain number of days from the receipt of the application, and shall deposit one-fourth of the freight with the agent of the company, the company failing to furnish them shall forfeit twenty-five dollars per day for each car failed to be furnished, the only proviso being that the law "shall not apply in cases of strikes or other public calamity," while not far from the line of proper police regulation, does not make allowance for the practical difficulties in the administration of the law, and, as applied to interstate commerce, transcends the legitimate powers of the legislature.²

PROHIBITING CONSOLIDATION OF COMPETING ROADS.

States may
prohibit
combina-
tion of com-
peting
roads.

A State may prohibit a railroad company from acquiring, by purchase, lease, or otherwise, any parallel or competing line, or from operating the

⁷ *Bagg v. Wilmington, etc., R. Co.*, (1891) 109 N. Car. 279.

⁸ *Porter v. Charleston, etc., R. Co.*, (1901) 63 S. Car. 169.

⁹ *Lowe v. Seaboard Air Line R. Co.*, (1901) 63 S. Car. 248.

¹ *Wall v. Norfolk, etc., R. Co.*, (1903) 52 W. Va. 485.

² *Houston, etc., R. Co. v. Mayes*, (1906) 201 U. S. 321, reversing (1904) 36 Tex. Civ. App. 606. See *supra*, p. 95.

same. Such action is a legitimate exercise of the police power of the State to create and regulate the instruments of interstate commerce, so far as necessary to the conservation of the public interests.³ And it has been said that several States through which interstate railroads run may authorize the consolidation of the roads in the adjoining States.⁴

That the Sherman Anti-Trust Law operates to prevent parallel or competing interstate railroads from entering into contracts or combinations, is pointed out in a previous part of this work.⁵

Application
of Sherman
Anti-Trust
law.

REGULATING CONNECTING CARRIERS.

Railroads may be compelled by the States to make track connections at the intersections of other roads for transferring cars from the lines or tracks of one company to those of another, as well as for facilities for the interchange of cars and traffic between their respective lines.⁶ Such regulations, affording facilities to interstate commerce, do not regulate such commerce within the meaning of the Constitution, unless in particular cases they conflict with Acts of Congress.⁷

States may
require
facilities
for inter-
change of
traffic.

But the imposition upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where, how, and by which carrier the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by

Requiring
connecting
carrier to
furnish
evidence
of loss.

³ Louisville, etc., R. Co. v. Kentucky, (1896) 161 U. S. 677.

⁴ Boardman v. Lake Shore, etc., R. Co., (1881) 84 N. Y. 157.

⁵ See *supra*, p. 42.

⁶ Wisconsin, etc., R. Co. v. Jacobson, (1900) 179 U. S. 287.

⁷ See Council Bluffs v. Kansas City, etc., R. Co. (1876) 45 Iowa 338.

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whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the commerce clause.⁸ Such a statute is much more onerous than the one sustained in *Richmond, etc., R. Co. v. R. A. Patterson Tobacco Co.*,⁹ which provided that although a carrier be released or exempted by contract from liability beyond its own line, yet, "if such thing be lost or injured such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge." Such a statute as this latter one simply establishes a rule of evidence ordaining the character of proof by which a carrier might show that, although it receives goods for transportation beyond its own line, nevertheless, by agreement, its liability is limited to its own line. This is very different from the duty imposed upon the carrier by the former statute, which imposes a liability unless the detailed information provided for in the statute is obtained and given to the shipper.¹

⁸ *Central of Georgia R. Co. v. Murphey*, (1905) 196 U. S. 194, reversing (1903) 116 Ga. 863.

⁹ (1898) 169 U. S. 311.

¹ A Missouri statute providing in part that "whenever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad, or transportation company issuing such bill of lading shall be liable for any loss, damage, or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad, or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad, or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage, or

REGULATING THE OPERATION OF TRAINS.

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State regulations respecting matters pertaining to the running of trains may be adopted and enforced, especially when they concern the safety or convenience of the public, except where they conflict with valid federal regulations.²

In matters concerning the safety or convenience of the public.

Regulating the speed of railroad trains only indirectly affects interstate commerce, and is within the power of the State, at least until Congress acts in the matter.³ In *Crutcher v. Kentucky*⁴

Regulating speed of trains.

injury it may be required to pay to the owner of such property, from the common carrier, railroad, or transportation company, through whose negligence the loss, damage, or injury may be sustained," was construed by the State court as not depriving a carrier engaged in interstate traffic from limiting his liability to his own line. As so construed, the statute was held to be valid. *Missouri, etc., R. Co. v. McCann*, (1899) 174 U. S. 580.

A statute providing that "when there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to the connecting road; the last company which has received the goods as 'in good order' shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability," was held to be valid as affording a remedy through the medium of a rule of evidence prescribing the probative value of a voluntary admission against the last road receiving the goods as "in good order." *Kavanaugh v. Southern R. Co.*, (1904) 120 Ga. 62.

² A State may require carriers to post in conspicuous places at their stations the time of the arrival of trains, whether or not the trains stopping at such stations are on time, and, if late, how much, and the fact that in order to carry out such a requirement the carrier may have to bring into use the communication of information possessed by servants at one point on the line of the road to those at another point on the line, situate in different States, does not make the regulation invalid. *State v. Indiana, etc., R. Co.*, (1892) 133 Ind. 69.

Providing for the lighting of railway crossings is valid. *St. Bernard v. Cleveland, etc., R. Co.*, (1896) 4 Ohio Dec. 371.

³ *Erb v. Morasch*, (1900) 177 U. S. 584.

⁴ (1891) 141 U. S. 47.

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Mr. Justice Bradley, speaking for the court, said: "It is . . . within the undoubted province of the State legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts, and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."⁵

Examina-
tion of
employees.

A State may prescribe that engineers on railroad trains engaged in the transportation of passengers and freight, including interstate trains, shall undergo an examination by a State board as to their qualifications before becoming entitled to operate locomotive engines within the State,⁶ and a statute which declares that all persons afflicted with color blindness and loss of visual power to the extent therein defined are "disqualified from serving on railroad lines within the State in the capacity of locomotive engineer, fireman, train conductor, brakeman, station agent, switchman, flagman, gate-tender, or signal man, or in any other position which

⁵ A statute which prohibits the running of trains at a greater speed than six miles an hour across a highway in or near thickly settled localities (*Clark v. Boston, etc., R. Co.*, (1887) 64 N. H. 323), and a municipal ordinance which prohibits the running of passenger trains at a greater speed than ten miles an hour or freight trains at a greater speed than six miles per hour (*Chicago, etc., R. Co. v. Carlinville*, (1902) 200 Ill. 314), have been held valid.

⁶ *Smith v. Alabama*, (1888) 124 U. S. 465.

requires the use or discrimination of form or color signals," and which provides for their examination and periodical re-examination, is valid.⁷

A State statute forbidding the heating of passenger cars in that State by stoves or furnaces kept inside the cars or suspended therefrom is valid, although such cars may be employed in interstate commerce, when Congress has not adopted any regulations with which such a State regulation would conflict.⁸

Heating of
passenger
cars.

Requiring Trains to Stop at Certain Stations.

Several State statutes regulating the stoppage of trains at certain places have been before the Supreme Court of the United States, with the result of determining to a fair degree of clearness the line between regulations which are reasonable and valid and those which are unreasonable and invalid. In the earliest of these cases, *Illinois Cent. R. Co. v. Illinois*,⁹ the provisions of an Illinois statute, requiring a fast mail train from Chicago to places south of the Ohio river, over an interstate highway established by authority of Congress, to delay the transportation of its interstate passengers and United States mail, by turning aside from its direct route and running to a station three and one-half miles away from a point on that route, and back again to the same point, before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station, for whom the railroad company furnished other and ample accom-

Requiring
fast train to
turn aside
from direct
route.

⁷ Nashville, etc., R. Co. v. Alabama, (1888) 128 U. S. 96.

⁸ New York, etc., R. Co. v. New York, (1897) 165 U. S. 628.

⁹ (1896) 163 U. S. 142.

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VII.At county
seats.

modation, were held to be an unreasonable restriction of interstate traffic.

At towns
over a cer-
tain size.

Upon the contrary, in *Gladson v. Minnesota*,¹ a Minnesota statute requiring every railroad to stop all its regular passenger trains, running wholly within the State, at its stations in all county seats long enough to take on and discharge passengers with safety, was held to be a reasonable exercise of the police power of the State, even as applied to a train connecting with a train of the same company running into another State, and carrying some interstate passengers as well as the mail. In *Lake Shore, etc., R. Co. v. Ohio* ² a statute of Ohio providing that every railroad company should cause three of its regular trains carrying passengers, if so many were run daily, Sundays excepted, to stop at a station, city, or village containing over three thousand inhabitants, for a time sufficient to receive and let off passengers, was held to be, in the absence of legislation by Congress upon the subject, consistent with the Constitution of the United States, when applied to trains engaged in interstate commerce through the State of Ohio.

At county
seats re-
gardless of
number of
trains.

Finally, in *Cleveland, etc., R. Co. v. Illinois*,³ the question presented was whether a statute of Illinois was valid which required every passenger train, regardless of the number of such trains passing each way daily and of the character of the traffic carried by them, to stop at every county seat through which such trains might pass by day or night, and regardless also of the fact whether another train designated especially for local traffic might stop at the

¹ (1897) 166 U. S. 427.

² (1899) 173 U. S. 285.

³ (1900) 177 U. S. 514.

same station within a few minutes before or after the arrival of the train in question. In holding the statute to be a direct burden upon interstate commerce, the court, after referring to the cases above mentioned, said, through Mr. Justice Brown: "With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principle we hold to in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable, and an infringement upon that provision of the Constitution which we have held requires that commerce between the States shall be free and unobstructed."

Accommodations for Different Races.

A Louisiana statute, as construed by the State courts, required those engaged in interstate commerce to give all persons traveling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. In *Hall v. DeCuir*⁴ it was held that the statute did not act upon interstate business through the local instruments to be employed after arriving within the State, but directly upon the business as it arrived in the State from without or went out from within, and was a direct burden upon interstate commerce.

In a later case, that of *Chesapeake, etc.. R. Co. v. Kentucky*,⁵ the question presented was whether

Requiring
that equal
accommodations be
given to
interstate
passengers.

Separate
coach law.

⁴ (1877) 95 U. S. 485.

⁵ (1900) 179 U. S. 388.

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VII.**

Construed
as applied
to domestic
commerce.

the separate coach law of Kentucky, requiring all railroad companies operating roads within the State of Kentucky, whether upon lines owned or leased by them, as well as all foreign companies operating roads within the State, to furnish separate coaches or cars for travel or transportation of white and colored passengers upon their respective lines of railroad, and to post in some conspicuous place upon each coach appropriate words in plain letters indicating the race for which it was set apart, was an infringement upon the exclusive power of Congress to regulate interstate commerce. The State courts had construed the act as applying alone to domestic commerce, but in one case⁶ the Kentucky Court of Appeals had said: "If it were conceded (which it is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the State, and, therefore, it should be held valid as to such passengers. It seems to us that a passenger taking passage in this State, and railroad companies receiving passengers in this State, are bound to obey the law in respect to this matter so long as they remain within the jurisdiction of the State." In the *Chesapeake, etc., R. Co. v. Kentucky* case, *supra*, the court, accepting the construction of the State court that the Act might be limited by construction to domestic commerce, held that it was valid as applied to the particular case, and in reply to the suggestion that the statute must be construed to regulate the travel or transportation on all railroads of all white and colored passengers, while they are in the State, without reference to where their

⁶ Ohio Valley R. Co. v. Lander, (1898) 104 Ky. 431.

journey commences and ends, the court said: "Granting that the last sentence from the opinion of the Court of Appeals, above cited, would seem to justify the railroad in placing interstate colored passengers in separate coaches, we think that this prosecution does not necessarily involve that question, and that the Act must stand, so far as it is applicable to passengers traveling between two points in the State."⁷

It will be noticed that the cases holding that statutes requiring separate accommodations for different races are valid have involved statutes which were expressly limited to domestic passengers, or which, if general in terms, have been limited by construction of the State courts to such persons, and that the invalidity of such statutes as applied to interstate passengers is a matter of inference. It is generally considered, upon the authority of these cases, that such statutes are invalid in so far as they affect interstate traffic, and it must be admitted that this is at least the proximate and natural inference.

In *Smith v. State*,⁸ however, where the Tennessee Supreme Court had under consideration a statute

⁷ See also *Louisville, etc., R. Co. v. Mississippi*, (1890) 133 U. S. 587, as to a Mississippi statute, which, as construed by the State Supreme Court, affected only commerce within the State.

And in *Plessy v. Ferguson*, (1896) 163 U. S. 537, it was not claimed that the separate coach law of Louisiana was an interference with interstate commerce, as the transaction in that case occurred on a local line, with both its termini within the State; the invalidity of the statute was urged upon the ground that it abridged the privileges or immunities of citizens, deprived the plaintiff of his property without due process of law, and also denied him the equal protection of the laws, but the contention was overruled, and the statute was held to be no violation of the Fourteenth Amendment.

⁸ (1898) 100 Tenn. 494.

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A state case holding separate coach law applicable to interstate passengers.

which provided for separate and equal accommodations, imposing no burden on either race and giving to each equal accommodations and privileges in every respect, the statute was held to be a reasonable police regulation and applicable to both intra-state and interstate travel. Chief Justice Snodgrass wrote the opinion of the court, and, enumerating the subjects of police regulation as including those relating to the order, the comfort, and the well-being of the public, as well as those relating to health, morals, and safety, said: "If it be true, as is sometimes said, that race prejudices exist here that make it uncomfortable or unsafe or promotive of disorder to mix the races in public conveyances, then both safety and good order are promoted, as well as comfort, in their separation. The State is to judge of the necessity for such a regulation." This suggestion of the chief justice must be understood as being limited in his mind by the consideration of the absence of controlling federal regulation. That such a State regulation imposes a burden upon the carrier, was supposed by the court not to be a valid objection, as an incidental burden resulting from the operation of a reasonable police regulation is not a regulation of commerce within the meaning of the Constitution.⁹ But in *Hart v. State*,¹ holding a Maryland statute to be invalid as applied to interstate passengers, the State Supreme Court, referring to the *Smith v. State* case, *supra*, said: "The contrary conclusion was reached in an exceedingly able opinion, but as we understand the decisions of the Supreme Court on analogous ques-

⁹ *Green v. Bridgeton*, (1879) 9 Cent. L. J. 206, 10 Fed. Cas. No. 5754.

¹ (1905) 100 Md. 595.

tions, and the views so strongly indicated by them on this particular subject, we do not feel at liberty to follow the Tennessee court."²

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Sunday Laws.

State laws relating to the observance of Sunday have been uniformly recognized as enacted in the legitimate exercise of the police power of the State, and in line with that doctrine it has been held, in *Hennington v. Georgia*,³ that a statute declaring that the transportation of freight shall be suspended on the sabbath day, under certain conditions and exceptions, although in a limited degree affecting commerce, establishes a rule of civil conduct, and is not a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the State by which it was established.⁴

Suspending
transportation
of freight.

REGULATING THE SALE OF TICKETS.

Several of the States have passed statutes, with the ostensible purpose of preventing frauds upon travelers, prohibiting the sale of tickets by others than specially authorized agents. In most cases the statutes have been sustained as not being regu-

Prohibiting
the business
of ticket
brokerage.

² See also *Anderson v. Louisville, etc., R. Co.*, (1894) 62 Fed. Rep. 46; *State v. Hicks*, (1892) 44 La. Ann. 770.

³ (1896) 163 U. S. 299.

⁴ See also *State v. Southern R. Co.*, (1896) 119 N. Car. 814; *Norfolk, etc., R. Co. v. Com.*, (1896) 93 Va. 749; *State v. Baltimore, etc., R. Co.*, (1884) 24 W. Va. 783.

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lations of commerce.⁵ In New York, however, it has been held that the business of selling passage tickets, or of ticket brokerage, is a lawful and legitimate business, and that such a statute is invalid as a deprivation of the "liberty" guaranteed by the State constitution.⁶

Regulating
stop-over
privileges.

A statute regulating the term within which tickets may be used and providing for stop-over privileges has been said to be inapplicable to tickets issued for interstate travel,⁷ but regulations requiring railway companies to have depots open a reasonable time before the departure of trains have been sustained.⁸

REGULATING THE TIME, PLACE, AND MANNER OF
DELIVERY.

A State, in the exercise of its police power, has authority to make reasonable regulations concerning the place, manner, and time of delivery of merchandise moving in the channels of interstate commerce,⁹ but an order directing carriers to deliver all cars containing interstate freight beyond their right of way to a private siding imposes a direct and onerous burden on interstate commerce. And if such an order is made in favor of a particular

Requiring
delivery of
cars beyond
right of
way.

⁵ *Burdick v. People*, (1894) 149 Ill. 600; *Stedman v. State*, (1878) 64 Ind. 597; *Fry v. State*, (1878) 63 Ind. 552; *State v. Corbett*, (1894) 57 Minn. 345; *State v. Thompson*, (Oregon 1906) 84 Pac. Rep. 476; *Com. v. Keary*, (1901) 198 Pa. St. 500.

⁶ *People v. City Prison*, (1898) 157 N. Y. 116.

⁷ *Lafarier v. Grand Trunk R. Co.*, (1892) 84 Me. 286.

⁸ *Hall v. South Carolina R. Co.*, (1886) 25 S. Car. 564.

⁹ Statutes which enforce the duty of a carrier to deliver property specified in a bill of lading to the legal holder thereof and which protect the rights of the holder are valid in the absence of congressional legislation on the subject. *Arkansas Southern R. Co. v. German Nat. Bank*, (1906) 77 Ark. 482.

person or corporation, it is not only invalid as a regulation of commerce, but is the assertion of a power concerning a subject covered by Acts of Congress which forbid, and provide remedies to prevent, unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce.¹

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Delivery of Goods on Tender of Freight Charges.

The Interstate Commerce Act of February 4, 1887, as amended by the Act of March 2, 1889, after requiring common carriers to print and post at stations the schedules of fares and rates, provides: "And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."¹* A Texas statute imposed a penalty for failure to deliver goods on tender of the rate named in a bill of lading. The State statute, as applicable to interstate ship-

Conflict between federal and State laws.

¹ McNeill v. Southern R. Co., (1906) 202 U. S. 543.

A State cannot compel a common carrier engaged in interstate transportation to deliver cars of live stock moving in the channels of interstate commerce at a particular place beyond its own line different from the general place of delivery established by the railway company, when it is not the means of making a physical connection that is aimed at, but it is sought to compel delivery of the cars at a particular place and in a particular way. Central Stock Yards Co. v. Louisville, etc., R. Co., (1902) 118 Fed. Rep. 113.

¹ * 25 Stat. at L. 855, 3 Fed. Stat. Annot. 828.

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ments, was held to be valid by the State Supreme Court,² but in *Gulf, etc., R. Co. v. Hefley*,³ Mr. Justice Brewer, for the United States Supreme Court, said: "Clearly the State and the national Acts relate to the same subject-matter and prescribe different rules. By the State Act the bill of lading is made controlling as to the rate collectible, and a failure to comply with that requirement exposes the delinquent carrier to its penalties, while the national statute ignores the bill of lading and makes the published tariff rate binding, and subjects the offender, both carrier and agent, to severe penalties. The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other;" but further remarked: "It may be conceded that were there no congressional legislation in respect to the matter, the State Act could be held applicable to interstate shipments as a police regulation."

GENERAL POWER OF CONGRESS TO REGULATE TRANSPORTATION RATES.

Prohibit
combina-
tions to con-
trol rates.

In *U. S. v. Joint Traffic Assoc.*⁴ a bill was filed for the purpose of obtaining an adjudication that an agreement entered into between some thirty-one different railroad companies was illegal and enjoining its further execution. It was held that Congress, in the exercise of its right to regulate commerce among the several States, or otherwise, has the power to prohibit, as in restraint of interstate commerce, a contract or combination between com-

² *Gulf, etc., R. Co. v. Dwyer*, (1890) 75 Tex. 572.

³ (1895) 158 U. S. 98.

⁴ (1898) 171 U. S. 505.

peting railroad corporations entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads, parties to the contract or combination, even though the rates and fares thus established are reasonable. And as to the power of Congress directly or indirectly to control the rates of interstate carriers, it was held in *Northern Securities Co. v. U. S.*⁵ that the Anti-Trust Act of July 2, 1890, embraced contracts between railroads in restraint of trade and commerce, and, affirming the power of Congress to protect the public against a combination formed for the purpose of obtaining the control of rates for passengers and freight, the court, speaking through Mr. Justice Harlan, said: "Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates — and upon that question we express no opinion — it does not choose to exercise its power in that way or to that extent. It has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no further than to protect the freedom of commerce among the States and with foreign states by declaring illegal all contracts, combinations, conspiracies, or monopolies in restraint of such commerce, and make it a public offense to violate the rule thus prescribed. How much further it may go, we do not now say."

Power directly to control rates.

But this may perhaps be considered as an instance of judicial caution, to avoid giving or inti-

⁵ (1904) 193 U. S. 197.

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mating an opinion on a question not under consideration. As a State has power to regulate rates for domestic transportation,⁶ if the power of Congress over the subject of commerce among the States is the same as that of the States in respect to purely local or internal commerce, as has been so often said, there must be a power in Congress directly to control interstate rates, within due constitutional limits.⁷

Within constitutional
restrictions.

It is undoubted that the power, if possessed, would have to be exercised in subjection to constitutional restrictions, and that rates could not be established which would have the effect of so limiting the earnings of the companies as in effect to deprive them of their property without due process of law. This consideration, as well as that of the extent of the jurisdiction of the courts to protect the rights of the carriers, raises fundamental constitutional questions not within the scope of this work.

Preference to Ports of One State over Those of Another.

Preference
as between
States and
not be-
tween
ports.

It has been suggested at times that the power of Congress directly to regulate the rates of interstate transportation could not be exercised, or would be difficult to exercise, without violating the limitation on the power to regulate commerce contained in the clause of Article I, section 9, of the Constitution, declaring that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." Though such a

⁶ See *infra*, p. 179.

⁷ See *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, (1889) 37 Fed. Rep. 567.

liberal construction of the clause may be given as will enforce its prohibition in its spirit and to its entirety, it cannot be given a construction not consistent with its terms. The clause does not say that no preference shall be given to one port over another, but that it shall not be given "to the ports of one State" over "those of another." And if the singular be considered as included in the plural, it can only be considered as a prohibition of the preference of one or more ports "of one State" over one or more ports "of another," and not as a prohibition of the preference of one port in a State over another port in the same State.⁸

The clause can only be intended to prohibit positive legislation looking to a direct privilege or preference. In the exercise of the national power of eminent domain there is the limitation of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation." Clear and positive, and having a definite purpose, as is this limitation, it has repeatedly been held to require compensation to be made only when property is actually taken or totally destroyed and not when damage to property results as the incidental effect of operations carried on by or under the authority of the national government. Much less then can it be supposed that the prohibition with regard to preferences to ports can have any reference to regulation of rates by Congress incidentally having the effect of creating a preference.

Incidental
preference
not in-
tended.

⁸ This suggestion does not go even so far as the dictum of Mr. Justice Nelson in *Pennsylvania v. Wheeling, etc., Bridge Co.*, (1855) 18 How. (U. S.) 421, wherein he said that "what is forbidden is not discrimination between individual ports within the same or different States, but discrimination between States."

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Declaring
bridge to
be a lawful
structure.

Obstruc-
tion of one
of two
channels.

Regulation
of rates
creating a
preference.

In two cases it has been held that the prohibition as to preference of ports is not against any incidental advantages that might result from the legislation of Congress upon subjects connected with commerce and confessedly within its power. In the first of these cases, *Pennsylvania v. Wheeling, etc., Bridge Co.*,⁹ it was held that an Act of Congress declaring a bridge to be a lawful structure, whereby, as claimed, the interruption of the navigation of steamboats, and the delay and expense arising therefrom, virtually operated to give a preference to one port over that of another, was not within the meaning of the clause. A like result was reached in *South Carolina v. Georgia*,¹ as to an obstruction placed by authority of Congress at the head of one channel in a navigable river between two States, for the purpose of improving another channel by increasing the flow of water through the latter, thus increasing its depth and waterway, as also the scouring effects of the current, at the expense of the obstructed channel; the court, through Mr. Justice Strong, saying: "The prohibition of such a preference does not extend to acts which may directly benefit the ports of one State and only incidentally injuriously affect those of another, such as the improvement of rivers and harbors, the erection of lighthouses, and other facilities of commerce."

Having reference then only to congressional legislation producing a direct and positive result intended to be prohibited, it is difficult to conceive of any regulation of rates for interstate transportation that would be likely of adoption by or under the authority of Congress, that could have more than

⁹ (1855) 18 How. (U. S.) 421.

¹ (1876) 93 U. S. 4.

a mere incidental effect, if any, of giving a preference to one port over that of another, much less to a port or ports of one State over a port or ports of another State.

POWER OF STATES TO REGULATE TRANSPORTATION RATES.

While rates on interstate traffic cannot be affected by State legislation,² a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done is in effect a deprivation of the carrier's property without due process of law or a denial of the equal protection of the law, or amounts to a regulation of foreign or interstate commerce.³ And though a rail-

Subject to
constitu-
tional limi-
tations.

² The action of a State board of railroad commissioners in fixing rates for continuous transportation between two points in the State is invalid when a large part of the route is outside the State. *Hanley v. Kansas City Southern R. Co.*, (1903) 187 U. S. 617. See *supra*, p. 151.

A statute providing that an express company may charge \$1.50 for every dollar charged by the railroad company whose lines it may be using, for transporting like articles by the regular freight trains of such railroad companies, except that for carrying packages weighing less than five pounds the rate of compensation shall not exceed twenty-five cents for any distance within the State, and for packages weighing more than five and less than fifty pounds the rate of compensation shall not exceed fifty cents for all distances within the State, is invalid as to a shipment by express from a point without the State to a point within. *Southern Express Co. v. Goldberg*, (1903) 101 Va. 619.

A State cannot interfere with "proportional tariffs" or collection of freight rates which apply wholly to interstate business and which have been approved of and acquiesced in by the United States Commerce Commission and the different companies on whose roads they are effective. *J. Rosenbaum Grain Co. v. Chicago, etc., R. Co.*, (1903) 130 Fed. Rep. 46.

³ *Georgia R., etc., Co. v. Smith*, (1888) 128 U. S. 174; *Railroad Commission Cases*, (1886) 116 U. S. 307.

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road corporation is organized under an Act of Congress, as to business done wholly within the State it is subject to the control of the State in the matter of domestic rates, when there is nothing in the act creating the company which indicates an intent on the part of Congress to remove the corporation in all its operations from the control of the State, and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress.⁴

Regulating Domestic Part of Interstate Rate.

Exclusive
power in
Congress.

If the transportation be partly within and partly without a State, the State cannot regulate that part of the transportation that is within. The rate cannot be split up according to the jurisdiction of the State or Territory nor can it be fixed by joint action of the States. There can be but one rate, fixed by one authority, and, if the transportation is from one State into another, the authority is in Congress.⁵

A statute of Wisconsin passed in 1874 classified

Chief Justice Waite said that railroad companies are incorporated as carriers for hire, and given extraordinary powers, in order that they may the better serve the public in that capacity, and that they are, therefore, engaged in a public employment affecting the public interest, and are subject to legislative control as to their rates of fare and freight, unless protected by their charters. *Chicago, etc., R. Co. v. Iowa*, (1876) 94 U. S. 155.

The power of the State cannot be denied because it may prescribe a different classification from that established by the companies, nor because it may be advisable for the companies to rearrange their interstate rates for their own convenience. *Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 165.

⁴ *Reagan v. Mercantile Trust Co.*, (1894) 154 U. S. 413.

⁵ *Hanley v. Kansas City Southern R. Co.*, (1903) 187 U. S. 617.

railroads in the State, fixed the limit of fare for the transportation of any person, classified freights and the maximum rates therefor, and prescribed certain penalties and forfeitures for receiving any greater rate or compensation for carrying freight or passengers than the act provided. The statute further provided that "nothing contained in this act shall be taken as in any manner abridging or controlling the rates for freight charged by any railroad company in this State for carrying freight which comes from beyond the boundaries of the State, and to be carried across or through the State; but said railroad companies shall possess the same power and right to charge such rates for carrying such freight as they possessed before the passage of this act." As providing for a maximum charge to be made for fare and freight upon the transportation of persons and property carried within the State, or taken up outside the State and brought within it, or taken up inside and carried without, the statute, in *Peik v. Chicago, etc., R. Co.*,⁶ was held not to be a regulation of commerce between the States, the court saying: "The law is confined to State commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State,

Chapter
VII.Early State
statutes
sustained.Transportation from
and into
the State.

⁶ (1876) 94 U. S. 164. See also *Chicago, etc., R. Co. v. Iowa*, (1876) 94 U. S. 155.

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VII.Early cases
overruled.

Wisconsin may provide for those within, even though it may indirectly affect those without.”

But in *Wabash, etc., R. Co. v. Illinois*,⁷ a different conclusion was reached. An Illinois statute provided that if any railroad corporation should charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within the State, the same or a greater amount of toll or compensation than was at the same time charged, collected, or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road, all such discriminating rates, charges, collections, or receipts, whether made directly, or by means of rebate, drawback, or other shift or evasion, should be deemed and taken against any such railroad corporation as *prima facie* evidence of unjust discrimination prohibited by the provisions of the statute. The State Supreme Court⁸ interpreted the statute to include cases of transportation partly within and partly without the State, and effectual as to so much of the transportation as was within the limits of the State, and, following the authority of *Chicago, etc., R. Co. v. Iowa*,⁹ and *Peik v. Chicago, etc., R. Co.*,¹ held the statute as so construed to be valid. But on a writ of error, the court in *Wabash, etc., R. Co. v. Illinois, supra*, virtually overruled the *Chicago, etc., R. Co. v. Iowa* and *Peik v. Chicago, etc., R. Co.* cases, *supra*, and said: “It

⁷ (1886) 118 U. S. 557. See *Burlington, etc., R. Co. v. Dey*, (1891) 82 Iowa 312.

⁸ *People v. Wabash, etc., R. Co.*, (1882) 104 Ill. 476.

⁹ (1876) 94 U. S. 155.

¹ (1876) 94 U. S. 164.

might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the State. The Supreme Court of Illinois having in this case given an interpretation which makes it apply to what we understand to be commerce among the States, although the contract was made within the State of Illinois, and a part of its performance was within the same State, we are bound, in this court, to accept that construction;” and said further: “Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated.”²

² Before Congress legislated on the subject of discrimination in freight charges by the Interstate Commerce Act of 1887, the right of a carrier to make discriminations was recognized at common law, and no State statute could affect such discriminations in respect to interstate shipments. *Gatton v. Chicago, etc., R. Co.*, (1895) 95 Iowa 112.

A statute enacted to prevent unfair or unjust discriminations by express companies, and to this end prohibiting the granting by such companies to any one carrier, class, or combination of carriers, any terms, credit, privileges, advantages, usages, accommodations,

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Regulation
by State
commis-
sion.

Right to
fix tariffs
and appor-
tion among
the several
railroads.

Joint Through Rates.

A State statute creating a railroad and warehouse commission, and defining its duties, is valid in so far as it authorizes the commission to establish joint through rates or tariffs over the lines of independent connecting railroads within the State, and arbitrarily to apportion and divide joint earnings.³

To the suggestion that the State may interfere as between the railways and their customers, the shippers of freight, but cannot do so as between the railways themselves, by fixing joint tariffs and apportioning such tariffs among the several railways interested in the transportation, the court, through Mr. Justice Brown, said: "The practical result of that argument is this, that if there were within a certain State five connecting roads of one hundred miles each in length, which among themselves had established a joint tariff for the whole five hundred miles, the State would be powerless to interfere with such tariff, though its right to do so would be unquestioned if the whole five hundred miles were owned and operated by a single company. To state such a proposition is prac-

or facilities in the receipt, transmission, or delivery of express matter which they did not grant to all others, was held to be valid, but the case itself was one of transportation between two points within the State. *Adams Express Co. v. State*, (1903) 161 Ind. 328.

But, it seems, as a railroad company has a right to make a contract with respect to interstate commerce, and to bind itself to certain rates, that a contract with a city by which, as a condition to occupy its streets, a company binds itself to impose no rates which are unequally discriminating against the city, may be enforced. *Iron Mountain R. Co. v. Memphis*, (1899) 96 Fed. Rep. 113.

When a statute is construed to be limited to domestic commerce, it is valid. *Railroad Com'r v. Wabash R. Co.*, (1900) 123 Mich. 669.

³ *Minneapolis, etc., R. Co. v. Minnesota*, (1902) 186 U. S. 257.

tically to answer it. Granting that a State has no right to interfere with the internal economy of a railroad farther than to secure the safety and comfort of passengers, as, for example, to fix the wages of employees or control its contracts for construction, or the purchase of supplies, it has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road, or for a joint action in the transportation of persons or property in which the public is indirectly concerned.”

Rates on Long and Short Hauls.

In *Louisville, etc., R. Co. v. Kentucky*,⁴ the validity of a Kentucky statute declaring that it should be unlawful for any person or corporation owning or operating a railroad in the State to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included in the longer distance, was considered. The statute was based upon a constitutional provision of similar tenor. As the particular case was one involving only transportation from one point in the State to another by a corporation of that State, and the statute did not in terms embrace a case of interstate commerce, it was held to be enforceable.

Statute applied to a case of domestic transportation.

But in another case the State Supreme Court construed the State constitutional provision as not

⁴ (1902) 183 U. S. 503.

Chapter
VII.Interstate
long haul
and domes-
tic short
haul.

confined to a case where the long and short hauls were both within the State of Kentucky, and held that it extended to and embraced a long haul from a place outside of to one within the State, and a shorter haul between points on the same line and in the same direction, both of which were within the State. As so construed, the regulation was declared invalid in *Louisville, etc., R. Co. v. Eubank*,⁵ the court saying that the vice of such a provision, thus applied, lies in the regulation of the rates between points wholly within the State, by the rates which obtain between points outside of and points within the State. The court further said, Mr. Justice Peckham writing the opinion, that "the fact which vitiates the provision is that it compels the carrier to regulate, adjust, or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress."

Requiring Rates to Be Fixed Annually and Posted.

In *Chicago, etc., R. Co. v. Fuller*,⁶ the question was as to the validity of a statute of Iowa requiring that each railroad company should, in the month of September, annually, fix its rates for the transportation of passengers and of freight of different kinds; that it should put up a printed copy of such rates at all its stations and depots, and cause a copy to re-

⁵ (1902) 184 U. S. 27.

⁶ (1873) 17 Wall. (U. S.) 560.

main posted during the year; and that a failure to fulfil these requirements, or the charging of a higher rate than was posted, should subject the offending company to the payment of the penalty prescribed. Mr. Justice Swayne, speaking for the court, said: "In all other respects there is no interference. No other constraint is imposed. Except in these particulars the company may exercise all its faculties as it shall deem proper. No discrimination is made between local and interstate freights, and no attempt is made to control the rates that may be charged. It is only required that the rates shall be fixed, made public, and honestly adhered to. In this there is nothing unreasonable or onerous. The public welfare is promoted without wrong or injury to the company. The statute was doubtless deemed to be called for by the interests of the community to be affected by it, and it rests upon a solid foundation of reason and justice. It is not, in the sense of the Constitution, in any wise a regulation of commerce." And even, added the court, if the State statute is a regulation, it is local in its character, and may be sustained in the absence of Congressional legislation.⁷

⁷ The Interstate Commerce Act of 1887 requires printed schedules of rates to be posted, and advances and reductions to be made only after public notice. See Act of February 4, 1887, c. 104, § 6, as amended by the Act of March 2, 1889, c. 382, § 1, 3 Fed. Stat. Annot. 827.

CHAPTER VIII.

TELEGRAPH AND TELEPHONE COMPANIES.

CONTROLLING POWER OF CONGRESS.

Chapter VIII.

Telegraph
as an in-
strument of
commerce.

COMMUNICATION by telegraph is commerce, and telegraph lines when extending through different States are instruments of commerce, and are subject to the regulating power of Congress, free from the control of State regulations except such as are strictly of a police character.¹ Chief Justice Waite, speaking for the court in *Western Union Tel. Co. v. Texas*,² said: "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits."

¹ *Western Union Tel. Co. v. James*, (1896) 162 U. S. 650; *Western Union Tel. Co. v. Alabama State Board of Assessment*, (1889) 132 U. S. 473; *Leloup v. Mobile*, (1888) 127 U. S. 640; *Western Union Tel. Co. v. Pendleton*, (1887) 122 U. S. 347; *Pensacola Tel. Co. v. Western Union Tel. Co.*, (1877) 96 U. S. 1.

Messages between points in the same State, transmitted over the wires of the same company and in part over the territory of another State, do not constitute interstate commerce. *Railroad Com'rs v. Western Union Tel. Co.*, (1893) 113 N. Car. 213; *Western Union Tel. Co. v. Reynolds*, (1902) 100 Va. 459.

² (1881) 105 U. S. 460.

Chapter
VIII.Telephone
as an in-
strument of
commerce.Judicial
suggestions
as to effect
of federal
control of
telephone
companies.

In a few State cases³ it has been held that the telephone is an instrument of commerce. And from the case of *Richmond v. Southern Bell Telephone, etc., Co.*,⁴ it may be inferred that the interstate business of a telephone company may be subjected to federal regulation, but a reading of the case leaves it very uncertain what degree of control Congress may exercise. In that case the question was presented whether a telephone company is entitled to claim the benefit of the provisions of the Act of Congress of July 24, 1866, referred to below,^{4*} that is, whether the words "telegraph company" included a telephone company. In holding that the privileges of the statute cannot be extended by implication only, the court, Mr. Justice Harlan writing the opinion, said: "If the act be construed as embracing telephone companies, numerous questions are readily suggested. May a telephone company, of right, and without reference to the will of the States, construct and maintain its wires in every city in the territory in which it does business? May the constituted authorities of a city permit the occupancy only of certain streets for the business of the company? May the company, of right, fill every street and alley in every city or town in the country with

³ See *Muskogee Nat. Telephone Co. v. Hall*, (1901) 4 Indian Ter. 18; *Matter of Pennsylvania Telephone Co.*, (1891) 48 N. J. Eq. 91.

Prohibiting discrimination between patrons and regulating the rental for the use of telephones is valid, as to a company engaged in interstate business. *Central Union Telephone Co. v. State*, (1888) 118 Ind. 194.

⁴ (1899) 174 U. S. 761.

In *Muskogee Nat. Telephone Co. v. Hall*, (1902) 118 Fed. Rep. 382, it was held a State could not grant the exclusive right to operate telephone lines within its borders.

^{4*} See *infra*, p. 190.

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VIII.

poles on which its wires are strung, or may the local authorities forbid the erection of any poles at all? May a company run wires into every house in a city, as the owner or occupant may desire, or may the local authorities limit the number of wires that may be constructed and used within its limits? These and other questions that will occur to every one indicate the confusion that may arise if the Act of Congress, relating only to telegraph companies, be so construed as to subject to national control the use and occupancy of the streets of cities and towns by telephone companies, subject only to the reasonable exercise of the police powers of the State. . . . If Congress desires to extend the provisions of the Act of 1866 to companies engaged in the business of electrically transmitting articulate speech — that is, to companies popularly known as telephone companies, and never otherwise designated in common speech — let it do so in plain words. It will be time enough when such legislation is enacted to consider any questions of constitutional law that may be suggested by it.”

Telegraph
companies
authorized
to construct
lines over
post roads,
etc.

By the Act of Congress of July 24, 1866,⁵ telegraph companies were authorized under certain conditions to construct, maintain, and operate lines of telegraph over the public domain and along any military or post roads of the United States. In *Pensacola Tel. Co. v. Western Union Tel. Co.*,⁶ it was held that the statute was constitutional so far as it declared the erection of telegraph wires to be, as against State interference, free to all who

⁵ Act of July 24, 1866, c. 230, brought forward into the Revised Statutes of the United States, §§ 5263 *et seq.*, 7 Fed. Stat. Annot. 205.

⁶ (1877) 96 U. S. 1.

accepted its terms and conditions, and that a telegraph company of one State accepting them could not be excluded by another State from prosecuting its business within her jurisdiction. In this case a State statute had conferred upon a single corporation the exclusive right of transmitting intelligence by telegraph from a certain portion of its territory, and it was held to be an attempt to regulate commerce, and to conflict with the above Act of Congress.⁷

Chapter
VIII.

Grant by
State of
exclusive
franchise.

POWER OF STATES TO ADOPT REGULATIONS.

The States may adopt regulations affecting telegraph companies, when such regulations are on matters of local concern, and unless their operation impairs the ability of the companies to attend to their interstate and foreign business.⁸ Under the police power, a State may make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may

Matters of
local con-
cern.

⁷ See also *Western Union Tel. Co. v. Pennsylvania R. Co.*, (1904) 195 U. S. 540; *Leloup v. Mobile*, (1888) 127 U. S. 640; *Western Union Tel. Co. v. Pendleton*, (1887) 122 U. S. 347; *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, (1869) 5 Nev. 102.

⁸ A State may require offices to be established at places convenient to routes to be designated by the State Railroad Commission. *Western Union Tel. Co. v. Mississippi R. Commission*, (1896) 74 Miss. 80.

A statute declaring a stipulation in a contract for the transmission of a message to be invalid which required notice of a claim for damages against a telegraph company to be given within sixty days after breach of the contract, is void, so far as it applies to messages sent into, and received from, another State. *Western Union Tel. Co. v. Burgess*, (Tex. Civ. App. 1897) 43 S. W. Rep. 1033.

Gambling operations by means of telegraphic communications may be prohibited. *State v. Harbourn*, (1898) 70 Conn. 484; *Louisville v. Wehmhoff*, (1903) 116 Ky. 845.

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require,⁹ and a State or the local authority may require the removal of poles and wires from a street to a less frequented alley,¹ and may require electric wires and cables to be placed under the surface of the streets.²

Regulating Transmission and Delivery of Messages.

Requiring
prompt
delivery
within the
State.

A State statute which requires telegraph companies diligently to transmit and deliver messages is a valid exercise of power in relation to messages by telegraph from points outside and directed to some point within the State. Such a statute "imposes a penalty," said Mr. Justice Peckham, in *Western Union Tel. Co. v. James*,³ "for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute."⁴ But a statute requiring telegrams to be delivered by messenger to the persons to whom they are addressed, if they reside within one mile of the telegraph station or within the city or town within which such station is, and which applies when the delivery is to be made in another State, is not within the power of a State, as conflict and confusion would follow the attempted exercise by sev-

Regulating
delivery in
other
States.

⁹ See *infra*, p. 301.

¹ *Michigan Telephone Co. v. Charlotte*, (1899) 93 Fed. Rep. 11.

² *Western Union Tel. Co. v. New York*, (1889) 38 Fed. Rep. 552.

³ (1896) 162 U. S. 650, *affirming* (1892) 90 Ga. 254. See also *Western Union Tel. Co. v. Lark*, (1895) 95 Ga. 806.

⁴ A statute imposing a penalty for delay may be enforced in the case of a message between points in the same State passing *en route* out of the State. *Western Union Tel. Co. v. Hughes*, (1905) 104 Va. 240.

eral States of such a power;⁵ though State courts have held statutes to be valid which impose penalties for failure to transmit messages intended for other States when the acts of negligence occur within the State,⁶ as where there is a failure to transmit the message from the point of origin.⁷

A State cannot provide that messages for and from officers of justice shall take precedence, or that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order, but that all other messages shall be transmitted in the order in which they are received. An attempt, by penal statutes, to enforce delivery of such messages in other States, in conformity with such a rule, could hardly fail to lead to confusion with their statutes.⁸

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VIII.

Penalizing
negligence
within the
State.

Regulating
order of
transmis-
sion.

⁵ *Western Union Tel. Co. v. Pendleton*, (1887) 122 U. S. 347.

⁶ *Western Union Tel. Co. v. Howell*, (1894) 95 Ga. 194. See *Western Union Tel. Co. v. Meredith*, (1883) 95 Ind. 93.

⁷ *Postal Tel. Cable Co. v. Umstadter*, (1905) 103 Va. 742.

⁸ *Western Union Tel. Co. v. Pendleton*, (1887) 122 U. S. 347.

CHAPTER IX.

NAVIGATION AND NAVIGABLE WATERS.

WHAT ARE NAVIGABLE WATERS.

Chapter IX.

Not limited
to tidal
waters.

THE common-law test of navigability, as held by the English admiralty courts, that waters are navigable which are subject to the ebb and flow of the tide, has long since been discarded in this country in favor of the more liberal principles of the civil law, equally with the common law embraced by the Constitution, as being more suited to the conditions of this country, with its vast extent and its inland seas, bays, and rivers.¹

When navigable in fact.

When Congress legislates respecting the "navigable waters of the United States," it is now understood that such streams are meant as are navigable in fact, and which by themselves or their connection with other waters or means of transportation form a continuous channel for commerce of a substantial and permanent character among the States or with foreign countries. They are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel by water.² But it cannot be supposed, in

¹ *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 678; *Nelson v. Leland*, (1859) 22 How. (U. S.) 48.

² *Miller v. New York*, (1883) 109 U. S. 385; *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 678; *The Daniel Ball*,

the absence of express provision, to be the intention of Congress to interfere with or prevent the exercise by a State of its power to reclaim swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as arteries of interstate commerce.³

Chapter
IX.

POWER OF CONGRESS OVER NAVIGABLE WATERS
GENERALLY.

The subject of the respective powers of the national and State governments in the control and regulation of navigation and navigable waters, necessarily and constantly arises in the consideration which is hereafter given to the power to regulate ships and shipping, and ferries; to the power to authorize the erection of bridges, wharves, piers, and docks, and the construction of canals, locks, dams, and booms; and to the laws respecting pilotage. It may here be said, however, that while the power of Congress to regulate the navigable waters which are connected with the ocean, between the States, or accessible from a State other than those in which they lie, is not expressly granted in the Constitution, it is nevertheless a power incidental to the express power granted by the commerce clause. It involves such control as may be necessary to insure their free navigation.⁴

Incidental
to the
power to
regulate
commerce.

(1870) 10 Wall. (U. S.) 557; *Rhea v. Newport News, etc., R. Co.*, (1892) 50 Fed. Rep. 16; *Neaderhouser v. State*, (1867) 28 Ind. 257.

³ *Leovy v. U. S.*, (1900) 177 U. S. 621.

Small streams declared navigable by State statutes, for the purpose of preserving them for the use of sawlogs and various kinds of small water craft, and to prevent people from putting dams across them, are not made navigable streams of the United States. *Duluth Lumber Co. v. St. Louis Boom, etc., Co.*, (1883) 17 Fed. Rep. 419.

⁴ *Leovy v. U. S.*, (1900) 177 U. S. 621; *Miller v. New York*,



Chapter
IX.Affirmative
exercise of
power.

Besides having the authority to supersede the action of a State which is considered rather to obstruct than to promote navigation, Congress may exercise its power over navigable waters affirmatively. The case of *South Carolina v. Georgia*,⁵ which was a bill in equity filed by the State of South Carolina against the State of Georgia, the Secretary of War, and United States engineer officers, for an injunction to restrain the respondents from "obstructing or interrupting" the navigation of the Savannah river, affirmed the power of Congress to authorize the placing of an obstruction at the point of divergence of two channels, for the purpose and probable effect of improving the channel on the Georgia side of the island at the expense of the channel on the South Carolina side, by increasing the flow of water through the former, thus increasing its depth and waterway. Not only was such action by Congress well within its derivative power over navigable rivers, but it was not within the limitation on the exercise of that power contained in Article I, section 9, of the Constitution declaring

(1883) 109 U. S. 385; *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 678; *Gilman v. Philadelphia*, (1865) 3 Wall. (U. S.) 713; *Grand Trunk R. Co. v. Backus*, (1891) 46 Fed. Rep. 211; *Jolly v. Terre Haute Draw-Bridge Co.*, (1853) 6 McLean (U. S.) 237, 13 Fed. Cas. No. 7,441.

It is immaterial that the stream was originally non-navigable or artificially constructed. *Navigable Waters*, (1891) 20 Op. Atty-Gen. 101.

When a compact between States to keep open the navigation of a river is sanctioned by Congress, it becomes a law of the Union. *Pennsylvania v. Wheeling, etc., Bridge Co.*, (1851) 13 How. (U. S.) 518.

Imposing embargoes on any or every class of commercial subjects is within the power of Congress. *U. S. v. Marigold*, (1850) 9 How. (U. S.) 560; *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 1.

⁵ (1876) 93 U. S. 4.

that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another," because of the incidental benefit to the ports of the State on the side of the river on which the improved channel flowed.⁶

POWER OF STATES OVER NAVIGABLE WATERS GENERALLY.

The power of a State over waters which are connected with interstate traffic may be exercised so long as the free navigation of the waters is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated. When, in the judgment of Congress, the action of a State is deemed to encroach upon free navigation, that body may interfere and control or supersede it, remove the obstruction, and provide against a recurrence of the evil.⁷

Subject to
paramount
authority
of Con-
gress.

With respect to rivers within the limits of a State, which are connected with interstate traffic, the State may authorize any improvement, and may provide for the removal of obstructions from the rivers and harbors and deepen their channels.⁸ In

Regulating
waters
within
State limits.

⁶ Congress may authorize alterations to be made in the course, width, etc., of navigable streams for the purpose of affording increased facilities for navigation, and for this purpose may take the property of a riparian owner, but only upon making or providing just compensation. *Avery v. Fox*, (1868) 1 Abb. (U. S.) 246, 2 Fed. Cas. No. 674.

The California Débris Commission Act, the Act of March 1, 1893, c. 183, 5 Fed. Stat. Annot. 61, was held to be within the power of Congress. *North Bloomfield Gravel Min. Co. v. U. S.*, (1898) 88 Fed. Rep. 664, *affirming* (1897) 81 Fed. Rep. 243.

⁷ *Huse v. Glover*, (1886) 119 U. S. 543; *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 678; *Gilman v. Philadelphia*, (1865) 3 Wall. (U. S.) 713.

⁸ *Sands v. Manistee River Imp. Co.*, (1887) 123 U. S. 288; *Mobile County v. Kimball*, (1880) 102 U. S. 691.

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the absence of express national legislation forbidding it, the power to regulate navigable waters within the limits of a State, especially such as are not highways of interstate commerce, extends even to the closing of them under the exercise of its police power, and any abridgment of the rights or privileges of those who have been accustomed to use them is an affair between the government of the State and its citizens, unless it comes in conflict with the Constitution or laws of the United States.⁹ This power of the States includes the right to construct or authorize the construction of locks, dams, and booms across navigable rivers and tidewater creeks, and to regulate the use of the same until Congress interferes and either assumes control of the improvements or compels their removal.¹

Exclusion
of State au-
thority over
domestic
waters not
implied.

Even if Congress has the power to exclude the exercise of authority by a State over waters entirely within its limits, it must be done expressly and not by mere implication. Though Congress may, in a limited sense, have taken possession of such a river, by improving it, by causing it to be surveyed, and by establishing lines beyond which no wharf, dock, or other structure shall be erected in the river without the approval or consent of the Secretary of

⁹ *Leovy v. U. S.*, (1900) 177 U. S. 621; *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 678; *Northern Transp. Co. v. Chicago*, (1878) 99 U. S. 635.

¹ *U. S. v. Bellingham Bay Boom Co.*, (1900) 176 U. S. 211; *Huse v. Glover*, (1886) 119 U. S. 543; *Pound v. Turk*, (1877) 95 U. S. 459; *Willson v. Black Bird Creek Marsh Co.*, (1829) 2 Pet. (U. S.) 245.

In the absence of legislation by Congress, a State has power to improve its lands and promote the general health by authorizing dams to be built across its interior streams, though they were previously navigable to the sea by vessels engaged in the coastwise trade. *Manigault v. Springs*, (1905) 199 U. S. 473.

War, this has a mere negative effect, and does not indicate the will of Congress that parties having simply the consent of the Secretary may erect structures without reference to the wishes of the State on the subject.²

The distinction between the power of a State over navigable waters which are interstate routes and those which are remotely connected with other means of interstate transportation, is illustrated by the *Gibbons v. Ogden*,³ and the *Veazie v. Moor*⁴ cases. Both cases involved the power of a State to grant an exclusive right to navigate waters of the State. In the *Gibbons v. Ogden* case, which was the earliest and leading case upon the commercial power of Congress, it was held that the acts of New York giving to Livingston and Fulton the exclusive right, for a certain number of years, to navigate all the waters within its jurisdiction with vessels propelled by steam, were unconstitutional and void. Making the navigation of those waters subject to a license of the grantees of the State, that is, to such a tax or other burden as they might levy, was an obstruction to commerce between the States and in conflict with the laws of Congress respecting the coasting trade. Although the sole point in judgment was whether the State could regulate commerce on her waters in the face of such legislation by Congress, yet the argument of the court was that such attempted control of the navigable waters of

State grant
exclusively
to navigate
interstate
route.

² *Cummings v. Chicago*, (1903) 188 U. S. 410, wherein Mr. Justice Harlan said: "Whether Congress may, against or without the expressed will of a State, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide." See also *Montgomery v. Portland*, (1903) 190 U. S. 89.

³ (1824) 9 Wheat. (U. S.) 1.

⁴ (1852) 14 How. (U. S.) 568.

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Exclusive
navigation
of domestic
improved
waters.

the State was an encroachment upon the power of Congress, independently of that legislation. In the *Veazie v. Moor* case, the power of the State of Maine to grant the sole right of navigating the river Penobscot, in that State, was sustained. It appeared that the river is situated entirely within the State, that it has its rise far in the interior of the State, that it is not subject to the tides above the city of Bangor near its mouth, and that, between Bangor and Oldtown, a distance of eight miles, the Penobscot passes over a fall. It further appeared that the river was crossed by four dams erected for manufacturing purposes, and for the above space was not and never had been navigable, but that there was a railroad from Bangor to the steamboat landing at Oldtown. The legislature granted to certain parties authority to improve the navigation of the river above Oldtown, and further provided that if the parties should perform the conditions of the grant, they should have the sole right of navigating the river by boats propelled by steam as far up as they should render the same navigable. The exclusive grant was sustained even against a vessel which had a federal license to carry on the coasting trade.

Rights of
new States.

The provision commonly inserted in an Act of Congress admitting a new State into the Union, that all the navigable waters shall be common highways and forever free, does not deprive the new State of any of the powers which the original States possessed over such waters within their limits. In such cases the statute usually declares that the State is admitted into the Union on an equal footing with the original States in all respects whatever.⁵

⁵ *Cardwell v. American Bridge Co.*, (1885) 113 U. S. 205.

The Ordinance of 1787 for the government of the territory of the

*Servitude of Shore and Submerged Soil.*Chapter
IX.State and
individual
ownership.

The common-law test of the navigability of waters, that they are subject to the ebb and flow of the tide, is now important only when considering the rights of riparian owners to the bed of the stream, as in some States it governs in that matter.⁶ The ownership of, and sovereignty over, the shore and submerged soil is in the several States and individual owners under them,⁷ but this is subject to the servitude in respect of navigation created in favor of the federal government by the Constitution.⁸

United States northwest of the Ohio river contained a clause declaring that certain navigable waters should be common highways and forever free. Upon the admission of any part of the territory as a State, such a limitation ceased to have any operative force, even if it had any after the adoption of the Constitution. "Equality of constitutional right and power is the condition of all the States of the Union, old and new." *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 678; *Sands v. Manistee River Imp. Co.*, (1887) 123 U. S. 288; *Huse v. Glover*, (1886) 119 U. S. 543.

⁶ *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 678.

⁷ New States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands below the high-water mark, unless Congress made grants of lands below high-water mark of navigable waters in any territory of the United States, and before its admission as a State, in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the territory. *Shively v. Bowlby*, (1894) 152 U. S. 1.

A statute granting the right of property in tide-water marsh lands, with power to reclaim and drain, is invalid. *Coxe v. State*, (1895) 144 N. Y. 396.

⁸ *Gibson v. U. S.*, (1897) 166 U. S. 269; *Illinois Cent. R. Co. v. Illinois*, (1892) 146 U. S. 337; *Galveston v. Menard*, (1859) 23 Tex. 349.

Private riparian rights of access are subsidiary to congressional power over commerce. *Winifrede Coal Co. v. Central R., etc., Co.*, (1890) 11 Ohio Dec. (Reprint) 35, 24 Cinc. L. Bul. 173.

Chapter
IX.To meet
expenses
incurred.*Levy of Tolls for River Improvements.*

Tolls may be levied upon all who use the rivers and harbors improved by the State or under its authority, to meet the expenses incurred in improving the navigation, as by the removal of rocks, the construction of dams and locks to increase the depth of water and thus extend the line of navigation, or the construction of canals around falls.⁹ Regulating the floating of logs and the exaction of reasonable charges for the use of a boom and its works, including the fees of State officials for inspecting and scaling, cannot be considered a burden upon interstate commerce.¹

A statute declaring that "it shall be unlawful for any person or corporation to transport, or carry through pipes, conduits, ditches, or canals the water of any fresh-water lake, pond, brook, creek, river, or other stream of this State, into any other State, for use therein," is valid as applied to a tidal stream, the bed of which, so far as the tide ebbs and flows, is the property of the State. *McCarter v. Hudson County Water Co.*, (N. J. 1905) 61 Atl. Rep. 710.

⁹ *Sands v. Manistee River Imp. Co.*, (1887) 123 U. S. 288; *Huse v. Glover*, (1886) 119 U. S. 543; *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 196; *Mobile County v. Kimball*, (1880) 102 U. S. 691.

Charging tolls for improved navigation does not violate the clause of Article I, section 10, of the Constitution, providing that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports." *McReynolds v. Smallhouse*, (1871) 8 Bush (Ky.) 447.

Nor does it conflict with action by Congress establishing a port of entry and delivery. *Thames Bank v. Lovell*, (1847) 18 Conn. 500.

See also *infra*, p. 274.

¹ *Lindsay, etc., Co. v. Mullen*, (1900) 176 U. S. 126; *Hospes v. O'Brien*, (1885) 24 Fed. Rep. 145; *Harrigan v. Connecticut River Lumber Co.*, (1880) 129 Mass. 580; *Scott v. Willson*, (1825) 3 N. H. 321; *Craig v. Kline*, (1870) 65 Pa. St. 399.

A State may give to a boom company, operating in a limited territory, the right to require compensation from the owners of logs floated singly for releasing them from obstruction in the stream.

HARBOR REGULATIONS.

Chapter
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A State may, by its legislature, or through a board of harbor commissioners, establish, for the protection and benefit of commerce and navigation, harbor lines in navigable waters, not inconsistent with any legislation of Congress limiting the building of wharves and other structures upon lands not already built upon.²

Authority of State to establish harbor lines.

The power of Congress is not limited to establishing harbor lines where none have previously existed, but it may supersede any regulations that a State has made, and the same power may be exercised in the same place in a different manner as often as the needs of commerce in that locality may require. But if there should be a violation of the laws of the United States by the location of harbor lines by a State, the vindication of the federal laws should be left to the general government, and cannot be invoked in a private suit to restrain State action which it is alleged will invade the property rights of the complainant.³

Power of Congress to supersede State regulations.

A State cannot make any regulations respecting vessels while in a harbor which would amount to regulations of commerce. In *Foster v. New Orleans*⁴ a State statute was held to be void which

State regulations respecting vessels.

Duluth Lumber Co. v. St. Louis Boom, etc., Co., (1883) 17 Fed. Rep. 419.

A statute giving to riparian owners compensation for logs drifted on shore is valid. *Henry v. Roberts*, (1892) 50 Fed. Rep. 902.

But a statute granting to county supervisors the right to charge and collect toll for the floating of logs and lumber is invalid. *Carson River Lumbering Co. v. Patterson*, (1867) 33 Cal. 334.

² *Prosser v. Northern Pac. R. Co.*, (1894) 152 U. S. 59; *Grand Trunk R. Co. v. Backus*, (1891) 46 Fed. Rep. 211.

³ *Yesler v. Washington Harbor Line Comrs.*, (1892) 146 U. S. 646; *Navigable Waters*, (1899) 22 Op. Atty-Gen. 501.

⁴ (1876) 94 U. S. 246.

Chapter
IX.Survey of
hatches.

declared it to be unlawful for any person other than the master and wardens of a port to make any survey of the hatches of sea-going vessels arriving at the port, or to make any survey of damaged goods going on board of such vessels. The act was not, in the sense of the Constitution, an inspection law, but its purpose had been declared by the State courts to be to furnish official evidence for the parties immediately concerned, and, where the goods were damaged, to provide for and regulate their sale.

The power of the States and their local bodies to make general regulations for the government of vessels lying in a harbor was summarized by Chief Justice Taney, in the case of *Cushing v. The Ship John Fraser*,⁵ wherein he said that "the local authorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there, where she may unload or take on board particular cargoes, where she may anchor in the harbor, and for what time, and what description of light she shall display at night to warn the passing vessels of her position, and that she is at anchor and not under sail." The case was one of collision, in which one of the vessels at the time of the collision was lying at anchor in a harbor, and was held to be partly in fault for not displaying the light prescribed by the local rules nor the usual signal light of a vessel at anchor at a place where vessels were continually passing.⁶ But in a similar case,⁷ the vessel at anchor was held not to be at fault in

Display of
lights.

⁵ (1858) 21 How. (U. S.) 184.

⁶ So much of a statute as declares in what parts of the waters of the State it shall not be lawful for vessels to anchor is valid. *Green v. Steamer Helen*, (1880) 1 Fed. Rep. 916.

⁷ *The Steamboat New York v. Rea*, (1855) 18 How. (U. S.) 223.

failing to show a light in conformity with the local statutes, but only a light sufficient within the requirements of the admiralty rule.

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IX.

Harbor dues or port charges may be exacted by a State from vessels in its harbors sufficient to meet the expenses incurred by the execution of the regulations, and as compensation for services actually rendered.⁸ A Louisiana statute, enacting that the master and wardens of the port of New Orleans should be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called on to perform any service or not, for every vessel arriving in that port, was declared to be invalid as a regulation of commerce.⁹

Harbor
dues sufficient
to meet ex-
penses.

WHARVES, PIERS, AND DOCKS.

A State may directly or through its municipalities authorize the construction of wharves, piers, and docks on navigable waters within its limits or bordering thereon, and may regulate their use, in any manner which does not conflict with existing

State
power to
authorize
construc-
tion and to
regulate.

⁸ *Harbor Master v. Southerland*, (1872) 47 Ala. 511.

Fees required for services actually rendered or tendered are not imposts or duties on imports or exports, which the States are forbidden to lay, by Article I, section 10, of the Constitution: *New Orleans v. Ship Martha J. Ward*, (1859) 14 La. Ann. 287; *New Orleans v. Prats*, (1845) 10 Rob. (La.) 459.

⁹ *Southern Steamship Co. v. Portwardens*, (1867) 6 Wall. (U. S.) 31. See the discussion in *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 196.

Requiring fees to be paid whether the officer is called upon to render any service or not is a burden upon commerce. *Webb v. Dunn*, (1882) 18 Fla. 721; *Geraghty v. Hackley*, (1872) 36 N. J. L. 459; *Hackley v. Geraghty*, (1870) 34 N. J. L. 332.

As to fees for harbor masters and wardens being duties of tonnage, see *infra*, p. 271.

Chapter
IX.Federal
and State
power to
define line
of naviga-
bility.

federal regulations.¹ The local regulations may designate places for the landing of vessels.²

The channel bank or line of navigability may be defined by the State in the absence of regulations by Congress, and in the absence of regulations by Congress or by the State or local authorities, the riparian proprietor may erect for himself, or for the use of the public, docks and wharves out to the line of navigability.³ A State may authorize the construction of wharves even below low-water mark when Congress has not passed any law affecting the right.⁴ But, as in the case of bridges erected by State authority alone, the risk of congressional interference is assumed, so in erecting wharves or piers below low-water mark, even with local or State authority, their interference with navigation is liable to be abated by federal regulations establishing harbor lines and defining the line of navigability.

Wharfage.

Wharfage is governed by local laws when there is no Act of Congress on the subject. By the State laws it is generally required to be reasonable, and by those laws its reasonableness is to be judged.⁵ The rule that wharfage is governed by local laws

¹ *Pound v. Turck*, (1877) 95 U. S. 459; *Cincinnati, etc., Packet Co. v. Catlettsburg*, (1881) 105 U. S. 559; *Parkersburg, etc., Transp. Co. v. Parkersburg*, (1882) 107 U. S. 691.

² *Cincinnati, etc., Packet Co. v. Catlettsburg*, (1881) 105 U. S. 559.

³ *Grand Trunk R. Co. v. Backus*, (1891) 46 Fed. Rep. 211.

⁴ *Savannah v. State*, (1848) 4 Ga. 26.

⁵ Charges to defray the expenses of wharves and other works necessary for the loading and unloading of vessels, and to secure convenient access to them, are not inconsistent with the clause of Article I, section 10, of the Constitution, providing that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports." *St. Louis v. Schulenburg, etc., Lumber Co.*, (1882) 13 Mo. App. 56; *First Municipality v. Pease*, (1847) 2 La. Ann. 538; *Worsley v. Second Municipality*, (1844) 9 Rob. (La.) 324.

is subject to two restrictions. In the first place, the rates must not discriminate in favor of vessels plying exclusively on the waters of the State, nor against the productions of other States.⁶ In the second place, they must not violate the last clause of section 10, Article I, of the Constitution, providing that "no State shall, without the consent of Congress, lay any duty of tonnage." This limitation is discussed in another place.⁷

FERRIES.

The extent of the power of the States to authorize and regulate ferries has not been clearly determined. The power to regulate ferries over waters entirely within their limits is one that may be exercised exclusively by the States,⁸ but whether a State may license and regulate ferries over waters separating two States is still a debatable question. In an early case, *Gibbons v. Ogden*,⁹ there is a dictum by Chief Justice Marshall to the effect that laws respecting turnpike roads, ferries, etc., form a portion of that immense mass of legislation which embraces everything within the limits of a State not surrendered to the federal government. Later cases,¹ following that suggestion, have sustained the power of one State to grant a license or franchise for a ferry across a navigable river, being the

State authority to regulate ferries over domestic waters.

Cases following Chief Justice Marshall's dictum.

⁶ *Guy v. Baltimore*, (1879) 100 U. S. 434. See also *Broeck v. The Barge John M. Welch*, (1880) 2 Fed. Rep. 364.

⁷ See *infra*, p. 272.

⁸ *U. S. v. Jackson*, (1841) 26 Fed. Cas. No. 15,458; *Mills v. St. Clair County*, (1845) 7 Ill. 197; *Marshall v. Grimes*, (1866) 41 Miss. 27; *Carroll v. Campbell*, (1891) 108 Mo. 550.

⁹ (1824) 9 Wheat. (U. S.) 1.

¹ *Fanning v. Gregoire*, (1853) 16 How. (U. S.) 524; *Conway v. Taylor*, (1861) 1 Black (U. S.) 603.

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IX

boundary between the granting State and another State, upon the theory that the nature of the business of ferrying is such that the granting of a privilege on the subject does not regulate interstate commerce. Upon the supposed authority of these cases, the power of a State to exact a license tax for the privilege of ferrying across a river lying between two States was affirmed in *Wiggins Ferry Co. v. East St. Louis*.² But in *Gloucester Ferry Co. v. Pennsylvania*,³ a statute of Pennsylvania, imposing a tax on the business of landing and receiving passengers and freight at a wharf in Philadelphia, on transportation across the Delaware river from New Jersey, by a ferry company incorporated and domiciled in New Jersey, was held to be void as repugnant to the commerce clause.

Doctrine of early cases doubted.

These cases have been reviewed in a recent case,⁴ wherein the power of a county to recover statutory penalties incurred by a transfer company because it had carried on a ferry for transporting railroad cars from the county to the shore of another State without obtaining a license from the county, as was required by the law of the State, was denied. Mr. Justice White, speaking for the court, observed: "Conceding, *arguendo*, that the police power of a State extends to the establishment, regulation, and licensing of ferries on a navigable stream, being the boundary between two States, none of the cases justifies the proposition that such power embraces transportation by water across such a river which does not constitute a ferry in a strict technical

Transfer company transporting railroad cars.

² (1882) 107 U. S. 365.

³ (1885) 114 U. S. 196.

⁴ *St. Clair County v. Interstate Sand, etc., Transfer Co.*, (1904) 192 U. S. 454.

sense;” and he defined a ferry in a strict sense as confined to the transportation of persons with or without their property. Though conceding, as above, *arguendo*, the court strongly intimated that the doctrine of the early cases, that the police power of the States extends to the regulation of ferries over navigable waters constituting boundaries between States, has been modified by the ruling in the *Gloucester Ferry* case, *supra*, and by the case of *Covington, etc., Bridge Co. v. Kentucky*,⁵ wherein it was held that one State has not power to regulate the rates of toll over a bridge connecting that State with another.

PILOTS AND PILOTAGE

The States have power to legislate concerning pilots and pilotage, as, although such laws are regulations of commerce, they fall within that class of powers which may be exercised by the States until Congress sees fit to act upon the subject.⁶

Statepower
to regulate.

The Act⁷ passed by the first Congress that met after the adoption of the Constitution, which declared that pilots shall continue to be regulated “by

Federal
recognition
of State
laws.

⁵ (1894) 154 U. S. 204.

Ferries are within the scope of the admiralty jurisdiction of the federal courts. The *Steamboat Cheeseman v. Two Ferryboats*, (1870) 2 Bond (U. S.) 363, 5 Fed. Cas. No. 2,633.

⁶ *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 1; *Cooley v. Board of Wardens*, (1851) 12 How. (U. S.) 299; *Ex p. McNiell*, (1871) 13 Wall. (U. S.) 236; *Wilson v. McNamee*, (1880) 102 U. S. 572; *Olsen v. Smith*, (1904) 195 U. S. 332; *The South Cambria*, (1886) 27 Fed. Rep. 525; *The Charles A. Sparks*, (1883) 16 Fed. Rep. 480; *The William Law*, (1882) 14 Fed. Rep. 792; *The Alzena*, (1882) 14 Fed. Rep. 174; *The Clymene*, (1882) 12 Fed. Rep. 346, *affirming* (1881) 9 Fed. Rep. 164; *Barnaby v. State*, (1863) 21 Ind. 450; *Cisco v. Roberts*, (1867) 36 N. Y. 292; *People v. Sperry*, (1867) 50 Barb. (N. Y.) 170; *State v. Penny*, (1882) 19 S. Car. 218.

⁷ Act of August 7, 1789, c. 9. See 5 Fed. Stat. Annot. 747.

Chapter
IX.Federal
statutes
paramount.

such laws as the States may respectively hereafter enact for that purpose " was a clear and authoritative declaration that the nature of the subject was such that until Congress shall find it necessary to exert its power it should be left to the legislation of the States; that it is local and not national; and that it is likely to be best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits. Acts of Congress have been passed regulating the employment of any pilot licensed by either of the States divided by boundary waters, and the employment of pilots on coastwise vessels, and also prohibiting discrimination in the rate of pilotage. These laws, and any which Congress may see fit to enact on the subject, supersede only such State legislation as directly conflicts therewith,⁸ and even where a State statute contains a conflicting provision, the statute will otherwise be given operation when the Supreme Court of that State has, by construction, eliminated the objectionable provision.⁹

Compensation of
pilots.

Laws regulating the compensation of pilots have been passed by the maritime States, in some instances providing that when a vessel is spoken by a pilot, and his services declined, he should be entitled to compensation, generally one-half pilotage fees, and such laws have been declared to be within

⁸ *Thompson v. Darden*, (1905) 198 U. S. 310; *Sprague v. Thompson*, (1886) 118 U. S. 90, *reversing* (1882) 69 Ga. 409; *Pacific Mail Steamship Co. v. Joliffe*, (1864) 2 Wall. (U. S.) 450. See *Freeman v. The Undaunted*, (1889) 37 Fed. Rep. 662; *The Alameda*, (1887) 31 Fed. Rep. 366; *Chapman v. Miller*, (1844) 2 Spears L. (S. Car.) 769.

⁹ *Olsen v. Smith*, (1904) 195 U. S. 332.

the power of the States to enact.¹ In *Wilson v. McNamee*,² wherein was questioned the validity of the New York statute requiring the payment of compensation when services have been tendered, though the master of a vessel may have refused to accept the services of the pilot, it was objected that the services were tendered outside the jurisdiction of the State of New York. But the court held that a vessel at sea is considered as a part of the territory to which it belongs when at home, and that the pilot, upon his boat, had the same authority from the laws of New York to tender and demand employment, and the same legal consequences, under the circumstances, followed the refusal of the master, as if both vessels had then been *infra faucès terræ*, where the municipal jurisdiction of the State was complete and exclusive. This principle, said the court, by Mr. Justice Swayne, "is, of course, subject to the paramount authority of the Constitution and laws of the United States over the foreign and interstate commerce of the country, and the commercial marine of the country engaged in such commerce,

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IX.

Half pilot-
age on
tender of
services.

¹ "If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, and the expenses and risks incurred by him in placing himself in a position to render the services, which, in the majority of cases, would be required. The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract. The absence of assent on the part of the master or owner of the vessel does not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting." *Per* Mr. Justice Field, writing the opinion of the court, in *Pacific Mail Steamship Co. v. Joliffe*, (1864) 2 Wall. (U. S.) 450.

² (1880) 102 U. S. 572.

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IX.

and subject also to the like power of Congress ' to define and punish piracies and felonies committed on the high seas and offenses against the law of nations.' ''³

Preference
to ports of
one State.

Clause 6, section 9, of Article I of the Constitution, which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, does not deny to Congress the power to permit the several States to adopt pilotage regulations.⁴

CANALS.

Power of
Congress to
construct.

Congress no doubt has power to construct or authorize the construction of canals and waterways to connect navigable bays, harbors, and rivers with each other or with the interior of the country for the accommodation of interstate commerce, and to prescribe regulations for their use and protection.⁵

Authority
of State
over canal
not connected
with navigable
waters.

A canal constructed by a State, or a watercourse partaking of the character of a canal, exclusively within the interior of a State, not connecting other navigable waters, and made practicable for naviga-

³ It has been said that the ground of the recognition and approval of the right of the States to establish pilotage regulations has been the necessity of conforming the regulations to the local peculiarities of each port, and that when that is satisfied, any further interference with commerce is as liable to objection as any other commercial regulation. *Williams v. The Lizzie Henderson*, (1880) 29 Fed. Cas. No. 17,726a.

⁴ *Thompson v. Darden*, (1905) 198 U. S. 310.

A State pilotage law which is found to be within the appropriate line which limits laws for the regulation of pilots and pilotage, and which imposes half pilotage when a pilot is not received, is not repugnant to the clause of Article I, section 8, of the Constitution, which declares that all duties, imposts, and excises shall be uniform throughout the United States, nor is it in effect an impost or duty on imports or exports or a duty of tonnage within the meaning of Article I, section 10. *Cooley v. Board of Wardens*, (1851) 12 How. (U. S.) 299.

⁵ *Stockton v. Baltimore, etc., R. Co.*, (1887) 32 Fed. Rep. 9.

tion by the funds of the State, or by privileges it may have conferred for the accomplishment of the same end, is exclusively within the power of the State to regulate,⁶ and a license procured from the United States to prosecute the coasting trade conveys no privilege to the vessel licensed to use such canals and improved waterways free of tolls or of any conditions whatever.

In this connection it is of interest to note, though not strictly concerning the subject of commerce, that it has been held that a United States admiralty court had jurisdiction *in rem* in the case of a collision between two canal boats of more than twenty tons burden, one of which was in tow and the other propelled by steam, which occurred on a canal used as a highway for commerce between ports in different States, though the canal was wholly artificial, and wholly within the body of a State, and subject to its ownership and control, and though one or the other of the vessels was at the time of the collision on a voyage from one place in the State to another place therein.⁷ The case of *The Robert W. Parsons*⁸ was one also of admiralty jurisdiction, wherein it was decided that a contract for the repair of a canal boat while lying on a drydock in a canal wholly within the limits of a State, connecting navigable waters, was within the exclusive jurisdiction of admiralty.

Admiralty
jurisdiction.

⁶ *Veazie v. Moor*, (1852) 14 How. (U. S.) 568.

In an opinion given to the Secretary of War on February 10, 1899, Attorney-General John W. Griggs said: "Canals being artificial waterways are likewise means of commercial transportation, as well as natural lakes and rivers, and the same principles may be applied to them that are applied to bridges, turnpikes, streets, and railroads." *Navigable Waters*, (1899) 22 Op. Atty.-Gen. 332.

⁷ *Ex p. Boyer*, (1884) 109 U. S. 629.

⁸ (1903) 191 U. S. 17.

CHAPTER X.

SHIPS AND SHIPPING.

GENERAL POWERS OF CONGRESS AND THE STATES.

Chapter X.

Power of
Congress
over vessels
and crews.

Use by for-
eign vessels
of improve-
ments pat-
ented in
this coun-
try.

AS instruments of intercourse and trade, ships and vessels, as well as the officers and seamen employed in their navigation, are embraced in the power of Congress to regulate commerce.¹ A law or rule emanating from any lawful authority which prescribes terms or conditions on which alone a vessel can discharge its passengers is a regulation of commerce, and, in the case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations, and cannot be adopted by a State.² Congress may permit or prohibit the entrance into United States ports of any foreign ship which in its construction or equipment uses any improvement patented in this country, or may prescribe the terms and regulations upon which such vessel shall be allowed to enter. The rights of property and exclusive use granted to a patentee do not extend to a foreign vessel lawfully entering, and the use of such improvement, in the construction, fitting out, or equipment of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of a patentee, provided it was placed upon

¹ State Tonnage Tax Cases, (1870) 12 Wall. (U. S.) 204.

² Henderson v. New York, (1875) 92 U. S. 259.

her in a foreign port, and authorized by the laws of the country to which she belongs.³

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X.

Acts of Congress making it a criminal offense to plunder vessels in distress,⁴ to board a vessel before arrival,⁵ or to enter into a conspiracy to cast away any vessel,⁶ are within the power of Congress to regulate commerce by means of water transportation.

Federal
criminal
laws.

Local police regulations respecting vessels plying the navigable waters of a State may be enforced, however, when they do not conflict with federal regulations. Thus a statute requiring vessels to be provided with fire screens,⁷ and a municipal ordinance prohibiting the emission of dense smoke from boats,⁸ have been held to be valid.

State police
regulations.

INSPECTION AND LICENSING.

Congress may provide and has provided for the enrolment and licensing of vessels engaged in the coasting trade.⁹ Ships or vessels of the United States, within the meaning of Acts of Congress, are those which are registered and enrolled under fed-

³ *Brown v. Duchesne*, (1856) 19 How. (U. S.) 183.

⁴ Rev. Stat. U. S., § 5358, 7 Fed. Stat. Annot. 87; *U. S. v. Coombs*, (1838) 12 Pet. (U. S.) 72.

⁵ Rev. Stat. U. S., § 4606, 7 Fed. Stat. Annot. 86; *U. S. v. Anderson*, (1872) 10 Blatchf. (U. S.) 226, 24 Fed. Cas. No. 14447.

⁶ Rev. Stat. U. S., § 5364, 7 Fed. Stat. Annot. 89; *U. S. v. Cole*, (1853) 5 McLean (U. S.) 513, 25 Fed. Cas. No. 14832.

⁷ *Burrows v. Delta Transp. Co.*, (1895) 106 Mich. 582.

⁸ *Harmon v. Chicago*, (1884) 110 Ill. 400.

⁹ *Sinnot v. Davenport*, (1859) 22 How. (U. S.) 227.

Boats wholly engaged on ferries within a State, and owned in such State, are subject to Acts of Congress requiring steamboats to be licensed and inspected. *U. S. v. Jackson*, (1841) 26 Fed. Cas. No. 15,458; *The Steamboat Sunswick*, (1872) 6 Ben. (U. S.) 112, 23 Fed. Cas. No. 13,624; *Inspection of Steam Ferry Boats*, (1884) 18 Op. Atty.-Gen. 16.

Chapter
X.

Vessel plying
between
places in
same State.

eral statutes.¹ In *The Daniel Ball*² the question was presented whether Acts of Congress requiring the inspection and licensing of vessels are applicable to a steamer engaged as a common carrier between places in the same State, when a portion of the merchandise transported by her is destined to places in other States, or comes from places without the State, she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another State. The *Daniel Ball* was a vessel propelled by steam, engaged in navigating Grand river in the State of Michigan, and to recover the penalty provided for want of inspection and license under Acts of Congress a libel was filed by the United States. The court laid down the rule that "the fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress," and while mindful that the case related to transportation on navigable waters, intimated that the rule might apply to interstate commerce when carried on by land transportation.

Lighters
and tug-
boats.

A steamboat engaged as a lighter and towboat,³ or simply as a tugboat,⁴ is entitled to the privileges resulting from federal enrolment and to exemption from burdens imposed by State regulation.

¹ *White's Bank v. Smith*, (1868) 7 Wall. (U. S.) 646.

² (1870) 10 Wall. (U. S.) 557.

³ *Foster v. Davenport*, (1859) 22 How. (U. S.) 244.

⁴ *Harman v. Chicago*, (1893) 147 U. S. 396.

Vessels enrolled and licensed, pursuant to the laws of the United States, have conferred upon them as full and complete authority to carry on the coasting, foreign, and interstate trade as it is in the power of Congress to confer.⁵ Such enrolment and license, nevertheless, confer no right that should be derived from State permission nor immunity from the operation of the valid laws of a State. They do not give a vessel any ferry rights,⁶ and if a vessel of the United States engaged in commerce between two States be interrupted therein by a law of the State, the seizure, detention, and forfeiture of such vessel may be authorized in the enforcement of the State law, as in the case of such a law prohibiting the use of particular instruments in dredging for oysters.⁷

RECORDING ACTS.

Matters pertaining to the title and property of vessels of the United States may be regulated by Congress, and include recording acts enacted for the protection of *bona fide* purchasers and mortgagees. Such a statute was the Act of Congress of July 29, 1850,⁸ providing, in part, "that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of

Federal
recording
acts.

⁵ *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 1.

⁶ *Conway v. Taylor*, (1861) 1 Black (U. S.) 603.

⁷ *Smith v. Maryland*, (1855) 18 How. (U. S.) 71.

⁸ This part of the statute was brought forward into Rev. Stat. U. S., § 4192, 7 Fed. Stat. Annot. 42.

Chapter
X.State regis-
tration
laws.

the customs, where such vessel is registered or enrolled," and the recording of a mortgage under the act protects the interest of the mortgagee against subsequent purchasers or mortgagees by its own force, irrespective of any State law on the subject.⁹

A State cannot require owners of such vessels to comply with State regulations respecting the registration of vessels, when such regulations impose conditions upon the privilege of navigating the waters of the State in addition to those required by federal laws,¹ and a statute which provides that a mortgage given to secure a note which does not on its face show that it is secured by a chattel mortgage, shall be absolutely void, is inapplicable to a mortgage on a vessel recorded under an Act of Congress.²

⁹ *Aldrich v. Ætna Ins. Co.*, (1869) 8 Wall. (U. S.) 491; *Whice's Bank v. Smith*, (1868) 7 Wall. (U. S.) 646; *Shaw v. McCandless*, (1858) 36 Miss. 296.

¹ Such a law, passed by the State of Alabama in 1854, providing that it should be the duty of the owners of steamboats navigating the waters of the State, before such boat should leave a port of the State, to file in the office of the probate judge a statement in writing, setting forth the name of the steamboat and of the owner or owners, his or their place or places of residence, and their interest therein, which statement should be signed and sworn to by the owners, or their agent or attorney, and which statement should be recorded by the said judge of probate; and also, in case of a sale of said boat, making it the duty of the vendee to file a statement of the change of ownership, his place of residence, and the interest transferred, which statement was required to be signed by the vendor and vendee, his or their agent or attorney, and recorded in the office of the afore-said judge, was held to be invalid, in *Sinnot v. Davenport*, (1859) 22 How. (U. S.) 227.

² *The Gordon Campbell*, (1904) 131 Fed. Rep. 963.

State statutes providing that a mortgage of personal property shall not be valid unless possession of the mortgaged property be delivered to, and retained by, the mortgagee, or unless such mortgage shall be duly recorded in the place in which the property shall be at the time of the mortgage, or in the place in which the mort-

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But the question as to what vessels may be required to conform to the regulations prescribed by Congress, whether those engaged in interstate and foreign commerce or all vessels navigating the navigable waters of the United States, can be determined by reference to the decisions of the United States Supreme Court only to a limited extent. The necessity of keeping in mind the dual power of the federal government over navigable waters, under the power to regulate commerce, and also under the grant of admiralty and maritime jurisdiction, involves the questions, as they arise, in some doubt.³

With respect to the power to regulate commerce, it must be conceded that Congress has power to prescribe the law of the highway, so far as may be necessary to protect interstate and foreign commerce, and to promote the safety and convenience of navigable waters considered as highways of commerce. To federal regulations having that object all vessels must conform, whether they are engaged in foreign or interstate commerce, in purely intrastate commerce, or in no commerce at all as in the case of pleasure yachts. All such vessels must comply with the rules prescribed for the prevention of collisions, such as rules concerning lights, signals, and steering and sailing, and for the qualifications and licensing of pilots and engineers.⁴

All vessels
to conform
to federal
rules of the
highway.

gagor resides, are invalid as conflicting with the Acts of Congress above referred to. *Mitchell v. Steelman*, (1857) 8 Cal. 363; *Cunningham v. Tucker*, (1873) 14 Fla. 251; *Wood v. Stockwell*, (1867) 55 Me. 76.

³ See *supra*, p. 194.

⁴ While a rule of navigation prescribed by the law of a State, as

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number of
passengers
— Precau-
tions
against fire.Law of ves-
sel-owner's
liability.

To the grant of admiralty and maritime jurisdiction may probably be referred the power of Congress to prescribe rules, and to declare penalties for their violation, respecting the carrying of more passengers than allowed by law,⁵ and precautions to be taken against fire,⁶ even as applied to vessels engaged in intrastate trade.

The power to prescribe the rules by which navigation shall be governed, necessarily involves the right to declare the liability of the owners of vessels plying on navigable waters of the United States

to the lights a vessel shall carry, is binding upon the courts of the State, it cannot regulate the decisions of the federal courts, administering the general admiralty law. They can be governed only by the principles peculiar to that system, generally recognized in maritime countries, as modified by Acts of Congress. The Steamboat *New York v. Rea*, (1855) 18 How. (U. S.) 223.

⁵ *The City of Salem*, (1889) 37 Fed. Rep. 846; *The Hazel Kirke*, (1885) 25 Fed. Rep. 601.

Requiring laws for the safety of passengers to be conspicuously posted on vessels is within the power of Congress, under this clause and the clause respecting admiralty and maritime jurisdiction. The *Lewellen*, (1868) 4 Biss. (U. S.) 156, 15 Fed. Cas. No. 8307.

⁶ *The Garden City*, (1886) 26 Fed. Rep. 766.

But in *The Gretna Green*, (1883) 20 Fed. Rep. 901, which was an action to recover statutory penalties because barges, carrying passengers on excursions, and being towed, were not provided with the means of safety for carrying passengers prescribed by Acts of Congress, the court said: "The complaint is that the barges were not provided with the means of safety for passengers as prescribed by Congress. They were in tow of a steamer which, the petition shows, was regularly enrolled and licensed, and subject to the laws of Congress. It may be that Congress has the power to prescribe the law of the highway so far as may be necessary to protect the interstate commerce, but no court will undertake to expound the Constitution and declare incidental powers, unless the question is directly presented, and the case imperatively requires it. The steamer which had these barges in tow being subject to the navigation laws of the United States, the mere fact that she took in tow the barges had nothing to do with any interference with the proper navigation of the Ohio river."

or the high seas for infractions of the regulations prescribed, though the vessels are engaged in the transportation of passengers and goods between ports and places in the same State.⁷ The power of Congress to legislate respecting the limitation of vessel-owners' liability is not, however, limited by the commerce clause. Such a law is one in amendment of the maritime law of the country, and the power of Congress to make amendments of the maritime law has been held to be coextensive with that law.⁸ But with reference to the rights and liabilities of persons engaged in commerce, the laws of the States govern in matters upon which the laws of Congress are silent; and in the absence of federal regulations touching the liability of parties for marine torts resulting in the death of persons injured, a State statute giving a right of action in such cases to the personal representatives of the deceased constitutes no encroachment upon the commercial power of Congress.⁹

Application
of State
laws to
rights and
liabilities.

State statutory liens enforceable in admiralty *in rem* when the lien is asserted as an incident of a maritime debt for necessary supplies or materials furnished, or for repairs or labor on the credit of the ship, cannot be treated as burdens upon commerce or classed with laws intended to interfere with freedom of commercial intercourse.¹ In *Johnson v. Chicago, etc., Elevator Co.*² the validity of a

State statu-
tory liens
for supplies
or labor.

⁷ Lord *v. Goodall, etc., Steamship Co.*, (1880) 102 U. S. 541.

⁸ *In re Garnett*, (1891) 141 U. S. 1. See *Providence, etc., Steamship Co. v. Hill Mfg. Co.*, (1883) 109 U. S. 578.

⁹ *Sherlock v. Alling*, (1876) 93 U. S. 99.

¹ *The Lottawanna*, (1874) 21 Wall. (U. S.) 558; *The Robert Dollar*, (1902) 115 Fed. Rep. 218; *The Del Norte*, (1898) 90 Fed. Rep. 506.

² (1886) 119 U. S. 388.

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State statute was questioned giving a lien by attachment in a suit *in personam* on water craft used in navigating the waters of the State, for damages arising from injuries done to persons or property through negligence. The suit was brought in the State court to recover damage to a warehouse by the negligent towing of a schooner, and, in sustaining the validity of the statute, the court said that "the proceeding to enforce the lien, in this case, was not such a regulation of commerce among the States as to be invalid, because an interference with the exclusive authority of Congress to regulate such commerce, any more than regulations by a State of the rates of wharfage for vessels, and of remedies to recover wharfage, not amounting to a duty of tonnage, are such an interference because the vessels are engaged in interstate commerce."

REGULATIONS AFFECTING SEAMEN.

Federal
regulations
for the pro-
tection of
seamen.

Mr. Justice Brewer, speaking for the court, in *Patterson v. Bark Eudora*,³ said that "it is within the power of Congress to protect all sailors shipping in our ports on vessels engaged in foreign or interstate commerce, whether they belong to citizens of this country or of a foreign nation." In that case it was held that an Act of Congress making it unlawful to pay any seaman wages in advance, making such payment a misdemeanor, and in terms providing that such payment shall not absolve the vessel or its master or owner from full payment of wages after the same shall have been actually earned, is valid as applied to contracts of sailors for services interstate and foreign.⁴ The liberty of contract guaranteed by the Constitution does not extend to

³ (1903) 190 U. S. 169.

⁴ Act of Congress of June 26, 1884, c. 121, § 10, as amended by

such contracts, as, said the learned justice, "Contracts with sailors for their services are, as we have seen, exceptional in their character, and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water. Being so subject, whenever the contract is for employment in commerce, not wholly within the State, legislation enforcing such restrictions comes within the domain of Congress, which is charged with the duty of protecting foreign and interstate commerce."⁵

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Constitutional guar-
anty of
liberty of
contract.

That such contracts are not within the spirit of constitutional prohibitions is further illustrated by the case of *Robertson v. Baldwin*,⁶ in which Acts of Congress, in so far as they required seamen to carry out contracts contained in their shipping articles,⁷ were held not to be in conflict with the Thirteenth Amendment of the Constitution, forbidding slavery and involuntary servitude. The federal statute imposing a penalty for harboring or secreting seamen⁸ has been repealed,⁹ but State statutes prohibiting aiding or enticing seamen to desert while in the waters of the State, have been held to be valid, when there is no Act of Congress on the subject.¹ If a State statute should prohibit sailors of foreign vessels from loading or unloading their own vessels, it would be to that extent invalid.²

Requiring
seamen to
carry out
contracts.

Harboring
seamen and
aiding them
to desert.

the Act of June 19, 1886, c. 421, § 3, and the Act of December 21, 1898, c. 28, § 24; 6 Fed. Stat. Annot. 871.

⁵ See also *Ex p. Pool*, (1821) 2 Va. Cas. 276.

⁶ (1897) 165 U. S. 275.

⁷ Rev. Stat. U. S., §§ 4598 and 4599, repealed by the Act of December 21, 1898, c. 28, § 25.

⁸ Rev. Stat. U. S., § 4601, 6 Fed. Stat. Annot. 918.

⁹ Act of December 21, 1895, c. 28, § 25, 6 Fed. Stat. Annot. 870.

¹ *Handel v. Chaplin*, (1900) 111 Ga. 800; *Ex p. Young*, (1900) 36 Oregon 247.

² *Cuban Steamship Co. v. Fitzpatrick*, (1895) 66 Fed. Rep. 63.

CHAPTER XI.

BRIDGES.

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XI.

General
rules.

BRIDGES over navigable streams which are entirely within the limits of a State are of the class of subjects on which the power of the State may be exercised as local in their nature,¹ and by concurrent action two States may bridge waters between them.² The power of the States is subordinate to that of Congress,³ but to render the action of a State invalid, the general government must directly interfere.⁴

Wheeling
Bridge
Cases.

The first cases involving the power of Congress and of the States were the *Wheeling Bridge Cases*.⁵ A comparison of these cases with more recent ones, recognizing bridges as proper subjects of local legislation, subject to the paramount power of Congress, shows how, in the early days of constitutional construction, it was necessary for the federal Supreme Court occasionally to explain previous decisions in

¹ *Cardwell v. American Bridge Co.*, (1885) 113 U. S. 205; *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 678.

² *Decker v. Baltimore, etc., R. Co.*, (1887) 30 Fed. Rep. 723.

³ In the absence of action by Congress, the power of the States to regulate or abate is plenary. *Navigable Waters*, (1891) 20 Op. Atty.-Gen. 101; *Rhea v. Newport News, etc., R. Co.*, (1892) 50 Fed. Rep. 16; *Green, etc., River Nav. Co. v. Chesapeake, etc., R. Co.*, (1888) 88 Ky. 1; *State v. Leighton*, (1891) 83 Me. 419; *Talbot County v. Queen Anne's County*, (1878) 50 Md. 245; *Dover v. Portsmouth Bridge*, (1845) 17 N. H. 200.

⁴ *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 678.

⁵ *Pennsylvania v. Wheeling, etc., Bridge Co.*, (1851) 13 How. (U. S.) 518, (1855) 18 How. (U. S.) 421.

a manner which even very careful investigation would consider little if any removed from an attitude of directly overruling them. The cases were heard upon the equity side of the court in the exercise of its original jurisdiction, the State of Pennsylvania being the party complainant. That State owned certain valuable public works, canals and railways, constructed at great expense as channels of commerce, for the transportation of passengers and goods, from which a large revenue, as tolls, was received by the State. The works terminated on the Ohio river, and were constructed with direct reference to its free navigation. The bills filed by the State charged the Wheeling and Belmont Bridge Company, a corporation chartered by the State of Virginia, with having constructed its bridge so low as to cause material obstruction to the commerce of the Ohio river, and especially injurious to the lines of improvement in the construction of which the State had expended several millions of dollars. Upon the final hearing in the first case, the court adopted the report of the commissioner, based upon a mass of testimony, and found as a fact that the bridge was an obstruction to navigation, that the State of Pennsylvania was entitled to relief, and decreed that the obstruction be removed, either by elevating the bridge to a height designated or by abatement. In the course of the opinion, written by Mr. Justice McLean, to the objection that there was no Act of Congress prohibiting obstructions on the Ohio river, the court said: "Congress have not declared in terms that a State, by the construction of bridges, or otherwise, shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it, as before remarked, by

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licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for neglect of those duties, by which damage to life or property has resulted. And they have expressly sanctioned the compact made by Virginia with Kentucky, at the time of its admission into the Union, 'that the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States.' " But this is no more than has been done by Congress with reference to the other navigable waters of the United States, and the power of Congress in the particular matter under consideration, as was said by Chief Justice Taney, in a dissenting opinion, had not been exercised. Soon after the rendition of this decree an Act of Congress was passed declaring the bridge to be a lawful structure in its then position and elevation. Shortly thereafter the bridge was blown down by a violent storm, and the company was preparing to rebuild it according to the original plan, when the State moved for a temporary injunction before one of the justices of the Supreme Court, which was granted. The court held upon the final hearing in this case that as an Act of Congress had declared the bridge to be a lawful structure, it could not be considered an obstruction to navigation in contemplation of law, although it still might be so in fact, and dissolved the injunction. In the course of the opinion in this second case, Mr. Justice Nelson, referring to the first case, said: "It was claimed, however, that Congress had acted upon the subject and had regulated the navigation of the Ohio river,

and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same; and that the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the Acts of Congress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the river, the act of the legislature of Virginia afforded no authority or justification. It was in conflict with the Acts of Congress, which were the paramount law." But it may be safely said that no one can read the opinion in the first case, apart from the subsequent judicial explanations, without concluding that the court put its decision upon the broad ground that it possessed an independent jurisdiction in equity to declare a bridge across a navigable stream, the erection of which had not been authorized by Congress, to be an obstruction to navigation, and as such to be a public nuisance, and to order its abatement. The court has never since assumed, and perhaps has not had occasion to assume, this position, and it is probable, in the case of an obstructing structure erected by authority of a State, but without authority of Congress, that the court would await positive action by the political department of the federal government.

The paramount authority being in Congress, its sovereign powers may be exercised, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, without the consent of the State,⁶ and it may authorize the erection of neces-

Federal authority to construct bridges.

⁶ *Luxton v. North River Bridge Co.*, (1894) 153 U. S. 525; *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, (1888) 37 Fed. Rep. 129; *Stockton v. Baltimore, etc., R. Co.*, (1887) 32 Fed. Rep. 9.

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declare
bridges
lawful or
unlawful.

sary piers upon lands under water.⁷ When Congress chooses to act it is not concluded by anything that the States, or individuals by their authority, have done.

Congress may declare certain bridges to be lawful⁸ or unlawful structures,⁹ and abate any erections that may have been made, remove offending bridges, and punish those who shall thereafter erect them.¹ In so doing Congress determines between the rival and conflicting claims of those who use the bridge as a highway, and those who use the river as a highway, which must yield to the other, and how far.²

Power of
Congress
to require
removal—
Taking of
private
property.

Those who act on State authority alone necessarily assume all the risks of legitimate congressional interference. When Congress has not authorized the erection of a bridge, but a State has, the action of Congress in requiring its removal cannot be regarded as a “taking of private property” within the meaning of the Fifth Amendment.³ And when congressional permission is given upon con-

⁷ *Stockton v. Baltimore, etc., R. Co.*, (1887) 32 Fed. Rep. 9; *Decker v. Baltimore, etc., R. Co.*, (1887) 30 Fed. Rep. 723.

⁸ *Clinton Bridge*, (1870) 10 Wall. (U. S.) 454. Though it in fact does impede steamboat navigation. *Pennsylvania v. Wheeling, etc., Bridge Co.*, (1855) 18 How. (U. S.) 421.

When the erection of a bridge is sanctioned by Congress, it is not a lawful structure unless as built it conforms to the terms and limitations of the authority. *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, (1888) 37 Fed. Rep. 129.

⁹ When Congress has declared a bridge to be an unlawful structure, no legislation of a State can make it lawful. *Newport, etc., Bridge Co. v. U. S.*, (1881) 105 U. S. 470. See also *U. S. v. Keokuk, etc., Bridge Co.*, (1891) 45 Fed. Rep. 178; *Decker v. Baltimore, etc., R. Co.*, (1887) 30 Fed. Rep. 723.

¹ *Willamette Iron Bridge Co. v. Hatch*, (1888) 125 U. S. 1; *Gilman v. Philadelphia*, (1865) 3 Wall. (U. S.) 713.

² *Winifrede Coal Co. v. Central R., etc., Co.*, (1890) 11 Ohio Dec. (Reprint) 35, 24 Cinc. L. Bul. 173.

³ *Navigable Waters*, (1896) 21 Op. Atty-Gen. 430.

dition that it may be revoked at any time if the bridge shall be found detrimental to navigation, the existence of the franchise is dependent upon the will of Congress, and the grantee assumes all the risks of loss arising from any exercise of the power which Congress has seen fit to reserve.⁴

The action of Congress in declaring a bridge to be a lawful structure, whereby it is claimed the interruption of the navigation of vessels engaged in commerce, and the delay and expense arising therefrom, stop the trade and business at one port or divert the same in some other direction or channel of commerce, is not a violation of the prohibition contained in Article I, section 9, of the Constitution, declaring that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."⁵

Preference to ports of one State by authorizing interruption to navigation.

The Act of Congress of September 19, 1890, ch. 907, conferred on the Secretary of War, when he has reason to believe that any bridge over any navigable waterway is an unreasonable obstruction to free navigation, authority to give notice to the owners so to alter the same as to render navigation reasonably free. In *Lake Shore, etc., R. Co. v. Ohio*⁶ it was held that the statute does not deprive the States of authority to grant power to bridge such streams, or to render lawful all bridges previously built with-

Concurrent federal and State action

⁴ *Newport, etc., Bridge Co. v. U. S.*, (1881) 105 U. S. 470.

⁵ *Pennsylvania v. Wheeling, etc., Bridge Co.*, (1855) 18 How. (U. S.) 421.

Though a port of entry has been created by Congress above a bridge, a court of the United States is without authority to restrain its erection, when the bridge has been authorized by a State over a navigable river lying wholly within the limits of the State. *Milnor v. New Jersey R. Co.*, (1857) 3 Wall. (U. S.) appendix, 782, 17 Fed. Cas. No. 9620.

⁶ (1897) 165 U. S. 365.

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out authority, but simply creates an additional and cumulative remedy to prevent such structures, although authorized by the States, from interfering with commerce. When a bridge is constructed in accordance with both State and federal requirements, it must be deemed a lawful structure and cannot be treated as a public nuisance.⁷

Regulat-
ing tolls—
Power of
Congress.

Congress undoubtedly has power to regulate the tolls on bridges used in interstate transportation. This right has even been asserted and sustained in the case of a bridge between one of the United States and a foreign country. A corporation was organized pursuant to concurrent legislation on the part of New York State and of Canada, authorizing a New York corporation and a Canadian corporation to consolidate and enjoy the franchises conferred by the legislation of the respective sovereignties. Under these acts the corporation was authorized to build and maintain a bridge across the Niagara river for the passage of persons on foot and in carriages, and for the passage of railway trains, and to fix and demand tolls for the use of the bridge and its approaches. As this river is a public navigable stream, it has been held that Congress had power to prescribe the compensation which the bridge company might charge for the use of its property, notwithstanding that by the State and Canadian legislation no limitation upon the rates of toll to be charged for the use of the bridge by railway trains was imposed, but the directors were empowered expressly or by implication to charge such tolls as they might deem expedient.⁸

⁷ *Miller v. New York*, (1883) 109 U. S. 385.

⁸ *Canada Southern R. Co. v. International Bridge Co.*, (1881) 8 Fed. Rep. 190.

A State has power to regulate the rates of toll on bridges over navigable waters wholly within the State, subject to the paramount authority of Congress, but in the case of a bridge connecting two States, such a power does not rest in one of the adjoining States, though it would seem that they have the power by reciprocal action to fix upon a tariff which shall be operative upon both sides of the river, always, of course, subject to the same paramount authority.⁹

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Power of
States to
regulate
tolls.

⁹ Covington, etc., Bridge Co. v. Kentucky, (1894) 154 U. S. 204.

CHAPTER XII.

SUNDRY SUBJECTS OF REGULATION.

WAREHOUSES AND ELEVATORS.

Chapter XII.

Subject to
local regu-
lations.

THE regulation of warehouses and elevators is a matter of domestic concern, as the business is carried on within the limits of the State. Incidentally they may become connected with interstate commerce, but not necessarily so, and until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. An Illinois statute prescribing the maximum rates for storing and handling grain in public warehouses,¹ and a North Dakota statute declaring elevators to be public warehouses and regulating their charges,² have been held not to be invalid as regulations of commerce. In *Budd v. New York*,³ holding that a New York statute regulating the charges of floating and stationary elevators was a regulation of commerce only on the waters of the State of New York, the court said: "It is of the same character with navigation laws in respect to navigation within the State and laws regulating wharfage rates within the State, and other kindred laws."

¹ *Munn v. Illinois*, (1876) 94 U. S. 113.

² *Brass v. North Dakota*, (1894) 153 U. S. 391.

³ (1892) 143 U. S. 517.

But when a grain elevator company is engaged in the business of exporting grain, and stops cars in transit to put the grain through the elevator for the purposes of cleaning and preparing it for further transportation, an order of a State railroad commission which in effect directs that grain purchased by the elevator company shall move through the place where the elevator is located, under seal in the cars in which it reaches that point, or shall be transferred by the railroad company to a connecting carrier without being stopped or treated at the elevator, relates to and affects interstate or foreign shipments of grain, makes it impossible for the elevator company to fulfil its contract for the exportation of grain, and has been said to be invalid.⁴

Chapter
XII.

Regulation
of inter-
state and
foreign
transac-
tions.

GAME AND FISH LAWS.

A Connecticut statute⁵ provided that "every person who shall buy, sell, expose for sale, or have in his possession for any purpose, or who shall hunt, pursue, kill, destroy, or attempt to kill any woodcock, quail, ruffed grouse, called partridge, or gray squirrel, between the first day of January and the first day of October, the killing or having in possession of each bird or squirrel to be deemed a separate offense, . . . shall be fined not more than

⁴ J. Rosenbaum Grain Co. v. Chicago, etc., R. Co., (1903) 130 Fed. Rep. 46.

A corporation owned a grain elevator and freight warehouse and several lines of railroad tracks which were used to afford facilities for access to its elevator and warehouse by cars owned by other companies. Its entire business consisted in loading, unloading, and storing grain and other freights which were the subjects of interstate or foreign transportation; no local freights were handled. It was held that the business of the corporation was of an interstate character. *People v. Miller*, (1904) 178 N. Y. 194.

⁵ Gen. Stat. Com., §§ 2530 and 2546, Revision of 1888.

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Establish-
ing a close
season for
game.

twenty-five dollars; ” and that “ no person shall at any time kill any woodcock, ruffed grouse or quail for the purpose of conveying the same beyond the limits of this State; or shall transport or have in possession, with intent to procure the transportation beyond said limits, any of such birds killed within this State. The reception by any person within this State of any such bird or birds for shipment to a point without the State shall be *prima facie* evidence that said bird or birds were killed within the State for the purpose of carrying the same beyond its limits.” In *State v. Geer*⁶ the State Supreme Court held, in interpreting the statute by the light afforded by previous enactments, that one of its objects was to forbid the killing of birds within the State during the open season for the purpose of transporting them beyond the State, and also additionally as a distinct offense to punish the having in possession, for the purpose of transportation beyond the State, birds lawfully killed within the State. It then decided that the statute, in creating this latter offense, did not violate the interstate commerce clause.

Common
ownership
of game.

In affirming the judgment of the State court, the Supreme Court of the United States⁷ said that aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, the right to preserve game proceeds from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly

⁶ (1891) 61 Conn. 144.

⁷ *Geer v. Connecticut*, (1896) 161 U. S. 519.

affected; such power flowing from the duty of the State to preserve for its people a valuable food supply, which belongs in common to all the people of the State, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the State and subject to the conditions which it may deem best to impose for the public good.⁸

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As an exercise of State police power.

Fisheries within the territorial jurisdiction of a State are subject to State regulation and protection. In holding a Massachusetts statute, passed for the protection of the fisheries "within the jurisdiction of this commonwealth" valid, Mr. Justice Blatchford, in writing the opinion of the court in *Manchester v. Massachusetts*,⁹ said that the statute

State protection of fisheries.

⁸ A State may prohibit the exportation of game. *Organ v. State*, (1892) 56 Ark. 267; *American Express Co. v. People*, (1890) 133 Ill. 649. *Contra*, *State v. Saunders*, (1877) 19 Kan. 127.

In *In re Davenport*, (1900) 102 Fed. Rep. 540, it was held that importation of game from another State cannot be prohibited. But in *Stevens v. State*, (1899) 89 Md. 669, the court said that the total prohibition of having game, from whatever source derived, in possession during the closed season, is a reasonable if not necessary means of protecting the domestic game of the State making the prohibition. To the same effect see *Magner v. People*, (1881) 97 Ill. 320; *People v. O'Neil*, (1896) 110 Mich. 324; *State v. Judy*, (1879) 7 Mo. App. 524; *Phelps v. Racey*, (1875) 60 N. Y. 10.

In *Ex p. Maier*, (1894) 103 Cal. 476, the court held that such a statute covered a sale of deer meat from an animal imported into the State, as the original package had been broken, saying: "Whether petitioner could have sold the meat as an entire carcass is a question which does not confront us, and which it is not, therefore, necessary to determine."

In *People v. Hesterberg*, (1906) 184 N. Y. 126, it was held that under the Act of Congress of May 25, 1900, c. 553, § 5, 3 Fed. Stat. Annot. 152, providing that game animals or birds, or the bodies of such, imported into a State, shall be subject to the operation of the laws enacted in the exercise of its police powers, a State may prohibit the importation or possession of the bodies of game animals or birds during the close season.

⁹ (1891) 139 U. S. 240, *affirming* (1890) 152 Mass. 230.

Chapter
XII.Swimming
fish.Menhaden
fish.

“ was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other States. If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, upon which we express no opinion, the statute may well be considered as an impartial and reasonable regulation of this liberty; and the subject is one which a State may well be permitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish, even although they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit; and we are of opinion that the statute is not repugnant to the Constitution and laws of the United States. . . . We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State.” And so the question was left open as to the right of Congress to control fisheries in the bays, inlets, harbors, and ports of the United States.¹

¹ A State may prohibit the taking of fish during certain seasons, though they may be taken with the purpose to ship them to another State. *Ex p. Fritz*, (1905) 86 Miss. 210. And a State may make it unlawful to have certain fish in possession during the close season, though such fish were taken in foreign waters. *People v. Lassen*, (Mich. 1906) 106 N. W. Rep. 143. See *People v. Buffalo Fish Co.*,

A State may protect the growth of oysters in the waters of the State by prohibiting the use of particular instruments in dredging for them. This power results from the State ownership of the soil, from the legislative jurisdiction of the State over it, and from the duty to preserve unimpaired those public uses for which the soil is held. It is within the power of the State to authorize the seizure, detention, and forfeiture of a vessel enrolled and licensed for the coasting trade of the United States, for a disobedience by those on board of the commands of such a law.² License fees may be exacted of those engaged in the business of planting, growing, and taking oysters.³ And the citizens of other States can be prohibited from planting oysters in a stream in that State where the tide ebbs and flows, when its own citizens have that privilege. As the State owns the land under water adapted to the propagation and improvement of oysters, it may grant the exclusive use of it for that purpose to its own citizens. "There is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade."⁴

(1900) 164 N. Y. 93, wherein the majority of the court assented to the position that the statute was applicable only to fish taken within the State.

² *Smith v. Maryland*, (1855) 18 How. (U. S.) 71. See also *Corfield v. Coryell*, (1823) 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3230, that a State may prohibit the taking of oysters at certain times and with destructive instruments.

³ *Dize v. Lloyd*, (1888) 36 Fed. Rep. 651; *State v. Corson*, (1901) 67 N. J. L. 178; *Johnson v. Loper*, (1884) 46 N. J. L. 321; *Haney v. Compton*, (1873) 36 N. J. L. 507.

⁴ *Per* Chief Justice Waite, in *McCready v. Virginia*, (1876) 94 U. S. 391. See also *State v. Harrub*, (1891) 95 Ala. 176; *State v. Medbury*, (1855) 3 R. I. 138.

Chapter
XII.

ADMISSION AND EXCLUSION OF ALIENS.

Plenary
power of
Congress.

In the *Japanese Immigrant Case*⁵ Mr. Justice Harlan said: "That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court."⁶ Congress may exclude some and admit others, and the reasons for its discrimination are not open to challenge in the courts, and it has the right to make the exclusion effective by punishing those who assist in introducing, or attempting to introduce, aliens in violation of its provisions.⁷ The Act of Congress of March 3, 1903, declaring that the following, among others, shall be excluded from admission into the United States: "anarchists, or persons who believe in or advocate the overthrow by force or violence of the government of the United States or of all governments or of all forms of law, or the

⁵ (1903) 189 U. S. 86.⁶ See also *Lem Moon Sing v. U. S.*, (1895) 158 U. S. 538.

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. *Nishimura Ekiu v. U. S.*, (1892) 142 U. S. 651. See also *Wong Wing v. U. S.*, (1896) 163 U. S. 228; *Fong Yue Ting v. U. S.*, (1893) 149 U. S. 698; *Chinese Exclusion Case*, (1889) 130 U. S. 581; *In re Florio*, (1890) 43 Fed. Rep. 114; *U. S. v. Craig*, (1886) 28 Fed. Rep. 795.

⁷ *Lees v. U. S.*, (1893) 150 U. S. 476.

assassination of public officials," is not open to constitutional objection.⁸

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An Act of Congress⁹ provided: "That there shall be levied, collected, and paid a duty of fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States." To the objection that the statute was in violation of the first clause of section 8 of Article I of the United States Constitution, providing that "the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States," the Supreme Court said: "But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce — of that branch of foreign commerce which is involved in immigration."¹ And even if such a statute violates provisions contained in prior treaties of the United States with friendly nations, the statute must prevail in all the judicial courts of this country.²

Head
money tax
on alien
passengers.

The right to expel or deport foreigners who have not been naturalized nor taken any steps towards becoming citizens of this country is as absolute and

Power to
expel or de-
port aliens.

⁸ U. S. v. Williams, (1904) 194 U. S. 279.

⁹ Act of August 3, 1882, 3 Fed. Stat. Annot. 294. By the Act of August 18, 1894, c. 301, 3 Fed. Stat. Annot. 295, the amount of the head money was increased to one dollar.

¹ Per Mr. Justice Miller, in Head Money Cases, (1884) 112 U. S. 580. See also Thingvalla Line v. U. S., (1889) 24 Ct. Cl. 255.

² See Chinese Exclusion Case, (1889) 130 U. S. 581.

Chapter
XII.

Personal
rights
guaranteed
by the Con-
stitution
applicable
to aliens

unqualified as the right to prohibit and prevent their entrance into the country.³

But in exercising the power to deport aliens found to be unlawfully within the United States, the personal rights guaranteed by the Constitution cannot be violated. Section four, chapter sixty, of the Act of Congress of May 5, 1892, provided: "That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be and remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided." And in a previous section of the act a summary hearing is provided for before a justice, judge, or commissioner. In a case in which a commissioner of a Circuit Court for the United States found that certain Chinese persons were unlawfully within the United States and not entitled to remain within the same, and he adjudged that they be imprisoned at hard labor at and in the Detroit house of correction for a period of sixty days from and including the day of commitment, and that at the expiration of said time they be removed from the United States to China, it was objected that the statute inflicted an infamous punishment and hence conflicted with the Fifth and Sixth Amendments of the Constitution, which declare that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. The

Fifth and
Sixth
Amend-
ments.

³ Fong Yue Ting v. U. S., (1893) 149 U. S. 698.

court, in *Wong Wing v. U. S.*,⁴ Mr. Justice Shiras writing the opinion, said: "Our views upon the question thus specifically pressed upon our attention may be briefly expressed thus: We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials. But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused."

EXCLUSION BY THE STATES OF CRIMINALS AND POOR AND DISEASED PERSONS.

In *Hannibal, etc., R. Co. v. Husen*,⁵ Mr. Justice Strong, writing the opinion of the court, incidentally said: "It may also be admitted that the police power of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public

As an exercise of the police power.

⁴ (1896) 163 U. S. 228.

⁵ (1877) 95 U. S. 465.

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charge, as well as persons afflicted by contagious or infectious diseases.”⁶

But in *Chy Lung v. Freeman*⁷ it had been held that a California statute which provided that the commissioner of immigration was to satisfy himself whether or not any passenger who should arrive in the State by vessel from any foreign port or place (who was not a citizen of the United States) was lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and was not accompanied by relatives who were able and willing to support him, or was likely to become a public charge, or had been a pauper in any other country, or was from sickness or disease (existing either at the time of sailing from the port of departure or at the time of his arrival in the State) a public charge, or likely soon to become so, or was a convicted criminal, or a lewd or debauched woman, and that no such person should be permitted to land from the vessel, unless the master or owner or consignee should give a separate bond in each case, conditioned to save harmless every county, city, and town of the State against any expense incurred for the relief, support, or care of such person for two years thereafter, was invalid. Mr. Justice Miller, in the course of the opinion, said: “We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be car-

Must be
reasonable
and ap-
propriate.

⁶ See also *State v. The Steamship Constitution*, (1872) 42 Cal. 578.

⁷ (1875) 92 U. S. 275.

ried beyond the scope of that necessity. When a State statute, limited to provisions necessary and appropriate to that object alone, shall, in a proper controversy, come before us, it will be time enough to decide that question. The statute of California goes so far beyond what is necessary, or even appropriate, for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified. Its manifest purpose, as we have already said, is not to obtain indemnity, but money.”⁸ And consistently with this principle it has been held that a State statute requiring railroads to return paupers, which was so general that it applied to all persons brought into the State by a carrier, without regard to wealth or poverty when brought in, and undertook to impose on the carrier the burden of removing or supporting any who should, within the time named, become destitute, was invalid.⁹

Requiring railroads to return any who should become destitute.

LOTTERIES.

The carrying of lottery tickets from one State to another by an express company engaged in carrying

⁸ In *In re Ah Fong*, (1874) 3 Sawy. (U. S.) 144, 1 Fed. Cas. No. 102, Mr. Justice Field, holding the Circuit Court of the District of California, said: “The extent of the power of the State to exclude a foreigner from its territory is limited by the right in which it has its origin, the right of self-defense. Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to State control or interference.”

A California statute prohibiting the coming of Chinese persons into the State, providing for registration and certificate of residence, and determining their status, was held to be void in *Ex p. Ah Cue*, (1894) 101 Cal. 197. See also *Lin Sing v. Washburn*, (1862) 20 Cal. 534.

⁹ *Bangor v. Smith*, (1891) 83 Me. 422.

Chapter.
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subjects of
commerce
by Con-
gress.Questions
involved in
the Lottery
Case.

freight and packages from State to State, although such tickets may be contained in a box or package, can by an Act of Congress be legally made to constitute commerce among the States.

The determination of the *Lottery Case*¹ involved the consideration of three questions, namely, whether lottery tickets are subjects of commerce, whether the power to regulate commerce includes the power to prohibit the transportation of recognized articles of commerce, and, as closely connected with the second question, whether prohibiting the transportation of lottery tickets infringed rights secured or protected by the Constitution. The second question is discussed at length in the first part of this work, in considering what constitutes the power to regulate.² Four justices dissented, and so close were the constitutional questions presented, that Mr. Justice Harlan, writing the opinion of the court, said: "The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States, Congress — subject to the limitations imposed by the Constitution upon the exercise of the powers granted — has plenary authority over such commerce, and

¹ (1903) 188 U. S. 321.

² See *supra*, p. 50.

may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress."

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So far as State legislation respecting lotteries is concerned, it has been held that a ticket in a lottery, authorized at the place of issue, cannot be regarded as within the protection of the commerce clause. In view of the legislation of Congress, this certainly must be so.³ And even in the absence of any legislation by Congress, the police power of the States would seemingly justify legislation prohibiting the introduction of lottery tickets into the State.

State laws
respecting
lotteries.

INSURANCE.

In *Paul v. Virginia*⁴ Mr. Justice Field, writing the opinion of the court, said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for the consideration paid by the latter."⁵ In that case it was held that a statute of Virginia, providing that no insurance company, not

Judicial
declaration
that insur-
ance is not
commerce.

³ *Roselle v. Farmer's Bank*, (1897) 141 Mo. 36.

When foreign government bonds are coupled with conditions and stipulations which change their character from a simple government bond for the payment of a certain sum of money to a species of lottery ticket, they are not salable within a State which prohibits the sale of any lottery tickets within the State. *Ballock v. State*, (1890) 73 Md. 1.

⁴ (1868) 8 Wall. (U. S.) 168.

⁵ See also *Philadelphia F. Assoc. v. New York*, (1886) 119 U. S. 110; and see *Liverpool Ins. Co. v. Massachusetts*, (1870) 10 Wall. (U. S.) 566, as to a statute held to be applicable to an English joint-stock association having the attributes generally found in corporations.

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incorporated under the laws of the State, should carry on its business within the State without previously obtaining a license, until it had deposited with the treasurer of the State bonds of a specified character varying in amount according to the extent of the capital employed, was valid.

A State statute which in effect annuls the provisions of a policy declaring that the contract shall be construed and interpreted according to the laws of the State in which the company was incorporated,⁶ and also a statute making it unlawful for an insurance agent or broker to act in the negotiation of insurance with a foreign insurance company not admitted to do business within the State,⁷ have been held to be valid.⁸

State regulation as an exercise of police power.

But deprivation of liberty of contract, without due process of law, in violation of the Fourteenth Amendment, has been held to result from the operation of a statute prohibiting the making of a marine insurance contract by the assured himself and not through a broker, outside the State, on property then in the State. That the regulation of insurance might be the proper subject for the exercise of the police power has been suggested by Mr. Justice Peckham, when, speaking for the court, on the question of the liberty of the citizen to contract for in-

⁶ *New York L. Ins. Co. v. Cravens*, (1900) 178 U. S. 389.

⁷ *Nutting v. Massachusetts*, (1902) 183 U. S. 553; *Hooper v. California*, (1895) 155 U. S. 648.

⁸ In *Lafayette Ins. Co. v. French*, (1855) 18 How. (U. S.) 404, it was held that where an insurance company chartered by one State was allowed to do business in another, upon the condition that service of process upon the agent of the corporation should be considered as service upon the corporation itself, a judgment against the company, obtained by means of such process, should be received with like full faith and credit in the State in which it was chartered.

insurance, he said that "this does not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper."⁹

The emphatic and repeated declarations of the United States Supreme Court, in the above cases, that insurance is not commerce, would seem to preclude further inquiry. All the cases, however, arose on State statutes. That Congress has the power to define, by inclusion and exclusion, what are the subjects of commerce—subject to the right of the courts to say that the subject declared by Congress to be commerce has no relation to intercourse—has been discussed in the first part of this work in the section on the power to define commerce.¹

If, under the principles there outlined, the subject of insurance may be said to be embraced by the term commerce, as generally defined, as understood by economists, or as colloquially used, the courts would probably be constrained to accept the legislative declaration that insurance is commerce, and to permit the operation of federal legislation on interstate and foreign insurance transactions. It is not easily perceivable, however, how Congress can constitutionally legislate on the subject, except indirectly, as by denying mail and interstate transportation facilities to a company which is not, in its interstate business, complying with the regulations prescribed by or under the authority of Congress. The situation would present a condition for which there is no precedent. Sustaining the validity of federal regulations would not necessarily mean the

Power of Congress to declare insurance to be commerce.

Probable judicial recognition of congressional definition.

Suggested effect of federal regulation.

⁹ *Allgeyer v. Louisiana*, (1897) 165 U. S. 578.

¹ See *supra*, p. 36.

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actual overruling of the foregoing insurance cases. Upon the repeal of the federal legislation, it would be within the province of the court to declare, in the absence of federal legislation, that insurance is not commerce, and again to give effect to State statutes. And even if federal laws were enacted, State regulations governing the conduct of the business of a domestic insurance company with citizens of the same State would not be rendered inoperative. Likewise, provisions of State statutes regulating transactions by citizens of the State with foreign insurance companies, which were not in actual conflict with the federal regulations, would probably be sustained if the suggestion above referred to, that the regulation of insurance partakes of the nature of the exercise of a police power, were followed.

STATE REGULATION OF FOREIGN CORPORATIONS.

Power to
exclude
foreign cor-
porations
or admit
them on
conditions.

Article IV, section 2, clause 1, of the Constitution provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The term citizens, as there used, applies only to natural persons, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed. Consequently, corporations are not citizens within the meaning of the above clause. Having no legal existence beyond the limits of the State which created it, a corporation cannot enter other States or claim the aid of their laws in the enforcement of its contracts, except upon the comity of those States. Having the absolute power of excluding the foreign corporation, a State may impose such conditions upon permitting the corpora-

tion to do business within its limits as it may judge expedient.²

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Exceptions
to the rule.

Two exceptions or qualifications are attached to this rule. One of these qualifications is that the State cannot exclude from its limits a corporation which is engaged in interstate or foreign commerce.³ The other limitation on the power of the State is

² *Diamond Glue Co. v. U. S. Glue Co.*, (1903) 187 U. S. 611; *Waters-Pierce Oil Co. v. Texas*, (1900) 177 U. S. 28; *Connecticut Mut. L. Ins. Co. v. Spratley*, (1899) 172 U. S. 602; *Orient Ins. Co. v. Daggs*, (1899) 172 U. S. 557; *Blake v. McClung*, (1898) 172 U. S. 239; *New York v. Roberts*, (1898) 171 U. S. 658; *Allgeyer v. Louisiana*, (1897) 165 U. S. 578; *Hooper v. California*, (1895) 155 U. S. 648; *Crutcher v. Kentucky*, (1891) 141 U. S. 47; *Home Ins. Co. v. New York*, (1890) 134 U. S. 594; *Fritts v. Palmer*, (1889) 132 U. S. 282; *Philadelphia F. Assoc. v. New York*, (1886) 119 U. S. 110; *Doyle v. Continental Ins. Co.*, (1876) 94 U. S. 540; *Home Ins. Co. v. Augusta*, (1876) 93 U. S. 116; *Liverpool Ins. Co. v. Massachusetts*, (1870) 10 Wall. (U. S.) 566; *Ducat v. Chicago*, (1870) 10 Wall. (U. S.) 410; *Paul v. Virginia*, (1868) 8 Wall. (U. S.) 168; *Lafayette Ins. Co. v. French*, (1855) 18 How. (U. S.) 404.

A further application of this principle, with its limitations, is dealt with in a later part of this work in discussing the taxation of the franchises of foreign corporations. See *infra*, p. 313.

³ *Fritts v. Palmer*, (1889) 132 U. S. 282; *Cooper Mfg. Co. v. Ferguson*, (1885) 113 U. S. 727; *Pensacola Tel. Co. v. Western Union Tel. Co.*, (1877) 96 U. S. 1.

A foreign corporation engaged in furnishing milling machinery and adjusting it in position in the mill is engaged in an act of interstate commerce, and need not comply with State laws requiring foreign corporations, before doing business in the State, to register their charters. *Milan Milling, etc., Co. v. Gorten*, (1894) 93 Tenn. 590.

A foreign corporation engaged in the press-dispatch business is not engaged in interstate commerce. *Associated Press v. Com.*, (Ky. 1901) 60 S. W. Rep. 295.

A loan of money by a foreign corporation to a citizen of the State is not a matter of interstate commerce. *Nelms v. Edinburg American Land Mortg. Co.*, (1890) 92 Ala. 157.

The execution of a canvasser's bond to a foreign corporation is a transaction of interstate commerce. *Gunn v. White Sewing Mach. Co.*, (1892) 57 Ark. 24.

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where the corporation is in the employ of the federal government or has been organized under the laws of Congress.⁴ Mr. Justice Bradley, at Circuit, said that "if Congress should employ a corporation of shipbuilders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union,"⁵ and in *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*⁶ Mr. Justice Field, in quoting with approval this passage, added "— without the permission and against the prohibition of the State."

Interstate
foreign cor-
poration to
comply
with local
regula-
tions.

Though a foreign corporation cannot be excluded by a State when it is engaged in interstate or foreign commerce, it nevertheless must comply with and is subject to the laws of the State governing the strictly local or domestic part of the business of such corporation. A foreign railroad company must provide equal accommodations for separate races, for the purely domestic part of its business, when the law of the State requires that arrangement,⁷ and the rates charged by a railroad, incorporated in two States, may be regulated by one of those States as to the intrastate transportation.⁸ The mere fact that a railroad corporation has been organized under the laws of Congress does not exempt it from State control in respect to rates for local freight. Congress can wholly remove such a corporation from State control, but in the absence of something in the statutes indicating an intention on the part of Congress so to remove it, the State

⁴ *Reagan v. Mercantile Trust Co.*, (1894) 154 U. S. 413.

⁵ *Stockton v. Baltimore, etc., R. Co.*, (1887) 32 Fed. Rep. 9.

⁶ (1888) 125 U. S. 181.

⁷ *Louisville, etc., R. Co. v. Mississippi*, (1890) 133 U. S. 587.

⁸ *Railroad Commission Cases*, (1886) 116 U. S. 307.

has the power to prescribe the rates for all local business carried by it.⁹

Not only is a foreign corporation, engaged in interstate commerce, under the control of the State in respect to its local business, but its business, both interstate and local, is within the control of the State in the exercise of its police power. Thus, interstate railroads must comply with State laws regulating the heating of cars,¹ requiring the examination of locomotive engineers for color blindness,² and prohibiting the running of freight trains on Sunday;³ and such corporations are within the operation of statutes invalidating contracts exempting a carrier from its common-law liability.⁴ In like manner, a foreign telegraph company is liable to a statutory penalty for failing to deliver dispatches within the State with due diligence, though they may have been sent from outside the State.⁵

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XII.

Interstate
foreign cor-
poration
subject to
State police
power.

⁹ *Reagan v. Mercantile Trust Co.*, (1894) 154 U. S. 413.

¹ *New York, etc., R. Co. v. New York*, (1897) 165 U. S. 628.

So far as concerns any leased line of railroad within a State, a foreign corporation is subject to the State police regulations. *Von Steuben v. Central R. Co.*, (1895) 4 Pa. Dist. 153.

² *Nashville, etc., R. Co. v. Alabama*, (1888) 128 U. S. 96.

³ *Hennington v. Georgia*, (1896) 163 U. S. 299.

⁴ *Chicago, etc., R. Co. v. Solan*, (1898) 169 U. S. 133.

⁵ *Western Union Tel. Co. v. James*, (1896) 162 U. S. 650.

CHAPTER XIII.

DISCRIMINATIVE STATE STATUTES.

Chapter XIII.

States with-
out power
to discrimi-
nate.

THE lack of legal force of State discriminative statutes was stated by Mr. Justice Harlan, in *Guy v. Baltimore*,¹ wherein he said: "No State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired."²

¹ (1879) 100 U. S. 434.

See also the discussion of discrimination by taxation, *infra*, p. 315.

² As to statutes prohibiting any but citizens of the State from planting oysters in or taking them from the navigable waters of the State, see that part of this work respecting the regulation of oyster fisheries, *supra*, p. 237.

A State cannot prohibit the peddling of goods from other States. *Sayre v. Phillips*, (1892) 148 Pa. St. 482.

A municipal ordinance providing that a railroad company whose business included the transportation of persons to a town in another State should sell to residents of the city, for a sum not to exceed

But though a part of a State statute be discriminatory, and therefore void, whether the legal clauses can be eliminated without destroying the other provisions is a State and not a federal question, and the Supreme Court of the United States will accept the interpretation given by the State court and will test their validity accordingly. And when the invalid clause is eliminated by the construction given by the State court, the statute, as so construed, will be allowed to operate.³

A municipal corporation, being authorized thereto by statute, selected a certain kind of asphalt, the product of a foreign country, for use in making improvements. It was held that the specification

Chapter XIII.

Construction of statute to avoid discriminative feature.

Specifying particular articles for municipal improvement.

\$1.50, commutation tickets good for thirty rides for thirty days from the date of issue, from any point on its line in the city over its bridge to any point in another State to which its cars might be operated, then from said point in that other State over its bridges and lines to any point on its lines in the city, was held to be invalid for discriminating in favor of the citizens of the State as against those of another State. *State v. Omaha, etc., R., etc., Co.*, (1901) 113 Iowa 30.

A statute requiring seed packets to be dated, and excepting seed sold by farmers in open bulk to other farmers, is invalid. *In re Sanders*, (1892) 52 Fed. Rep. 802. As is also a statute stipulating conditions to the sale of trees, plants, shrubs, or vines, and excepting such grown in the State. *In re Schechter*, (1894) 63 Fed. Rep. 695.

³ *Olsen v. Smith*, (1904) 195 U. S. 332, as to a pilot law, the discriminating provisions of which, if allowed to stand, would have been in conflict with an Act of Congress. See also *Howe Mach. Co. v. Gage*, (1879) 100 U. S. 676, *infra*.

Statutes favoring domestic wines were held to be invalid in *McCreary v. State*, (1883) 73 Ala. 480; *Powell v. State*, (1881) 69 Ala. 10; *Higgins v. Rinker*, (1877) 47 Tex. 381.

But in *Ex p. Kinnebrew*, (1888) 35 Fed. Rep. 52, and *State v. Deschamp*, (1890) 53 Ark. 490, the invalid clause or clauses were stricken out and the sale of imported and domestic wines permitted; and in *Weil v. Calhoun*, (1885) 25 Fed. Rep. 865, the clause protecting domestic wines was declared void and the broad prohibition clause was given full effect.

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of this particular asphalt, there being other deposits in other States from which suitable asphalt could have been had, was not an interference with interstate commerce. While such use of a foreign commodity to the exclusion of like material found in the United States may in a limited degree affect interstate commerce, it is not one of those direct interferences with the power over, and express control of, the subject given by the Constitution to Congress. Nor can the provisions of the Sherman Anti-Trust Act be invoked in such a case, as that statute was not intended to affect contracts which have only a remote and indirect bearing upon commerce.⁴

Action of
State officer
under a
State monopoly.

Under one of the South Carolina dispensary laws, it was urged that the law, giving to the State officers exclusive right to purchase all the liquor to be sold in the State, gave the officers the opportunity, by exercising their right of purchase, to buy

⁴ *Field v. Barber Asphalt Paving Co.*, (1904) 194 U. S. 618.

In *People v. Coler*, (1901) 166 N. Y. 144, it was held that a statute requiring only materials manufactured in the State to be used on public works was invalid as a regulation of commerce.

But in *Allen v. Labsap*, (1905) 188 Mo. 692, it was held that a municipal ordinance, providing that "all ordinances and contracts authorizing the doing of public work in the city of St. Louis which involves the use of dressed rock, granite, or stone shall contain a provision that the work of dressing such rock, granite, or stone shall be done within the territorial limits of the State of Missouri," was valid.

A statute requiring goods made by convict labor, except as thus made in the enacting State, to be branded, was held to be invalid in *People v. Hawkins*, (1895) 85 Hun (N. Y.) 43. The statute was amended by striking out the discriminating clause, but, as thus amended, was held to be invalid as discriminating against prison-made goods in favor of those made by free labor. *People v. Hawkins*, (1898) 157 N. Y. 1. See *Bogart v. State*, 10 Ohio Dec. (Reprint) 365, 20 Cinc. L. Bul. 458, as to the invalidity of a statute requiring a license to be paid to sell convict-made goods.

in one State to the detriment and exclusion of the products of every other State. It was argued that this arbitrary power demonstrated the inherent discrimination arising from legislation which made State officers the sole persons authorized to buy and sell liquor, and that these supposed unjust consequences could only be avoided by recognizing the right of the residents of all other States to ship their products into the State and sell them in original packages. But the court, speaking by Mr. Justice White, in *Vance v. W. A. Vandercook Co.*,⁵ said: "To maintain this proposition, the presumption must be indulged in that the State officer, in purchasing as provided by the State statute, instead of buying fairly and in the best markets, affording an equal chance to all sellers and to every locality, will, on the contrary, so act as to discriminate against the products of one or more States and in favor of those of others. Such a presumption would be equally justified in case the State law authorized only residents to be licensed to sell liquor and restricted the number of such licenses. The persons so licensed, whether one or one hundred, would buy where they pleased the liquor they proposed to sell, and it would therefore be fully as cogent to argue that they might elect to buy in one place instead of another, and thus discriminate against the persons or places from where or from whom they did not buy." And as disposing completely of the contention, it was pointed out that the right to ship merchandise from one State into another, guaranteed by the commerce clause and protected until the termination of the shipment by delivery at the place of consignment, is wholly unaffected by the Act of Congress of August

Effect of
Wilson Act.⁵ (1898) 170 U. S. 438.

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8, 1890,⁶ which allows State authority to attach to the original package before the sale but only after delivery. And it was further said that the conclusion that it is the right of every resident of South Carolina to receive for his own use liquor from other States, and that the inhibitions of a State statute do not operate to prevent liquors from other States from being shipped into such State, on the order of a resident for his use, "demonstrates the unsoundness of the contention that if State agents are the only ones authorized to buy liquor for sale in a State, and they select the liquor to be sold from particular States, the products of other States will be excluded."⁷

Inspection
laws.

The power of a State to pass inspection laws is limited by the consideration that no discrimination can be made against products or industries of some States in favor of products and industries of its own or of other States.⁸ Requiring certain materials brought into the State to be inspected and have

⁶ See *supra*, p. 143.

⁷ "When a State recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States; * * * such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting State as against similar products of the other States." *Per* Mr. Justice Shiras, in *Scott v. Donald*, (1897) 165 U. S. 58.

⁸ *Austin v. Tennessee*, (1900) 179 U. S. 343; *Brimmer v. Rebman*, (1891) 138 U. S. 78.

A Massachusetts statute requiring an inspection of all lime imported or sold in that State, but prescribing no standard either of quality, or mode of packing, or size of casks, except as to lime manufactured in Massachusetts or imported from Maine, was held to be invalid, for providing for the forfeiture of a cask of lime sold or exposed to sale when the cask was not of the prescribed size, while there was no provision as to the size of a cask in which lime might be sold if imported from any State but Maine. *Higgins v. Three Hundred Casks Lime*, (1880) 130 Mass. 1.

the State inspection marked thereon, when not required of similar materials manufactured in the State, is an instance of discrimination, and a statute of Virginia declaring as follows: "(1) All flour brought into this State and offered for sale therein shall be reviewed, and have the Virginia inspection marked thereon. (2) Any person or persons selling or offering to sell such flour without review or inspection, as provided in the preceding section, shall be fined the sum of five dollars, for the use of the commonwealth, for each barrel so sold or offered for sale," was held to be void.⁹

The State of Minnesota passed a statute providing that all cattle, sheep, and swine to be slaughtered for human food within the respective jurisdictions of the inspectors should be inspected by the proper local inspector appointed in Minnesota, within twenty-four hours before the animals were slaughtered, and that a certificate should be made by such inspector, showing, if such were the fact, that the animals, when slaughtered, were found healthy and in suitable condition to be slaughtered for human food. But in *Minnesota v. Barber*¹ Mr. Justice Harlan, delivering the opinion of the court, said that "as the inspection must take place within the twenty-four hours immediately before the slaughtering, the act, by its necessary operation, excludes from the Minnesota market, practically, all fresh beef, veal, mutton, lamb, or pork—in whatever form, and though entirely sound, healthy, and fit for human food—taken from animals slaughtered in other States; and directly tends to restrict the

Inspection
of animals
to be
slaughtered
for food.

Within
twenty-
four hours
before
slaughtering.

⁹ Voight v. Wright, (1891) 141 U. S. 63. See Glover v. Flour Inspectors, (1891) 48 Fed. Rep. 348.

¹ (1890) 136 U. S. 313.

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When
slaughtered
over one
hundred
miles from
place of
sale — In-
spection
see.

slaughtering of animals, whose meat is to be sold in Minnesota for human food, to those engaged in such business in that State." And under a statute of Virginia declaring "that it shall not be lawful to offer for sale, within the limits of this State, any fresh meats (beef, veal, or mutton) which shall have been slaughtered one hundred miles or over from the place at which it is offered for sale, until and except it has been inspected and approved as hereinafter provided. . . . And for all fresh meat so inspected said inspector shall receive as his compensation one cent per pound, to be paid by the owner of the meat," the owner of meats from animals slaughtered one hundred miles or over from the place of sale, being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, could not compete upon equal terms, in the markets of that commonwealth, with those in the same business whose meats of like kind, from animals slaughtered within less than one hundred miles from the place of sale, were not subjected to inspection; and it was said that "a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discrimination against the products and industries of some of the States in favor of the products and industries of its own or of other States."²

² Per Mr. Justice Harlan, in *Brimmer v. Rebman*, (1891) 138 U. S. 78. See also *Ex p. Kieffer*, (1889) 40 Fed. Rep. 399; *Swift v. Sutphin*, (1889) 39 Fed. Rep. 630; *Schmidt v. People*, (1892) 18

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Exempting
certain ves-
sels from
compulsory
pilotage.

A law of the State of Virginia imposing compulsory pilotage on all vessels inward bound from sea through the Virginia capes, other than coasting vessels having a pilot's license, and likewise imposing compulsory pilotage on all vessels outward bound through the capes is not in and of itself discriminatory. The fact that Virginia has no appreciable commerce from her own ports inward bound through the capes, and that the State does not subject the commerce on her internal waters to a compulsory charge for pilotage, does not render the law invalid, as in conflict with an Act of Congress avoiding the provisions of all State regulations making "any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States."³

The city of Baltimore adopted a municipal ordinance declaring that "all vessels resorting to or lying at, landing, depositing, or transporting goods or articles other than the production of this State, on or from any wharf or wharves belonging to the mayor and city council, or any public wharf in the said city, other than the wharves belonging to or rented by the State, shall be chargeable with the wharfage as fixed by this ordinance, upon all goods or articles landed or deposited on any wharf or wharves belonging to the said mayor and city council; and the master or owner of the vessel so

In wharf-
age, for
using mu-
nicipal
wharves.

Colo. 78; *Hoffman v. Harvey*, (1891) 128 Ind. 600; *State v. Klein*, (1890) 126 Ind. 68.

³ *Thompson v. Darden*, (1905) 198 U. S. 310.

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depositing, landing, or transporting said goods or articles, shall be responsible for the same.” In *Guy v. Baltimore*⁴ it was argued in support of the ordinance that the city, by virtue of its ownership of the wharves, had the right, in its discretion, to permit their use to all vessels landing thereat with the products of Maryland, and that those operating vessels laden with the products of other States could not justly complain, so long as they were not required to pay wharfage fees in excess of reasonable compensation for the use of the city’s property. But it was held that while the city, if it chose, could have permitted the public wharves, which it owned, to be used without charge, or could have exacted wharfage fees equally from all who used its improved wharves, it could not be permitted by discriminations of that character to impede commercial intercourse.⁵

⁴ (1879) 100 U. S. 434.

⁵ A statute which makes a distinction of wharfage between canal boats plying on the waters of the State exclusively, and all other canal boats and barges, is invalid; wharfage charges can be compensatory merely, and a mere compensatory payment must be general and uniform. *Broeck v. The Barge John M. Welch*, (1880) 2 Fed. Rep. 364.

PART III.

*STATE TAXATION AS AFFECTING
COMMERCE.*

CHAPTER XIV.

TAXATION OF IMPORTS AND EXPORTS.

ONE of the clauses enumerated in the beginning of this work is that of Article I, section 10, providing that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

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Chief Justice Marshall, in an early case,¹ pointed out that this clause is to be considered as part of the taxing power and not as part of the power to regulate commerce, and that, the power having been given to Congress "to lay and collect taxes, duties, imposts, and excises," it was probable that the Constitutional Convention was of the opinion that a State might impose duties on imports and exports, if not expressly forbidden. However this may be, it can hardly be doubted that, even in the absence of this prohibition, the same rule that is applied to goods received from other States would be applied to imports from foreign countries, under the power granted to Congress to regulate commerce "with foreign nations, and among the several States,"

Limitations
on taxing
power or
regulation
of com-
merce.

¹ Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 1.

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which is, as is hereafter shown,² that the goods received from other States cannot be discriminated against by taxes imposed upon them on account of their nondomestic origin. But this prohibition on the State to lay imposts or duties on imports or exports does not permit imports to be taxed even as property within the State, until after they cease to be imports by being mingled with other property in the State.³

Meaning of
terms—
Chief
Justice
Marshall's
definitions.

The meaning of the words "imposts or duties on imports or exports" was thus stated by Chief Justice Marshall:⁴ "An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are 'imports'? The lexicons inform us, they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. 'A duty on imports,' then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its

² See *infra*, p. 315.

³ See *infra*, p. 292.

⁴ *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 419.

literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country." But at the close of the opinion, the case holding that a State statute taxing, by way of discrimination, importers who sold, by wholesale, foreign goods, was repugnant to this clause, the chief justice remarked: "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State." This casual remark, in connection with the particular holding, seems to have been misunderstood, and left open the question whether the words "imports and exports" include importations from other States.

The words "imposts," "imports," and "exports," being frequently used in the Constitution, if there is a clear idea of what either word means in any particular connection in which it may be found, this furnishes a satisfactory test of its definition in other parts of the same instrument. Referring to that clause of Article I, section 8, which provides that "the Congress shall have power to lay and collect taxes, duties, imposts, and excises, . . . but all duties, imposts, and excises shall be uniform throughout the United States," Mr. Justice Miller, speaking for the court in *Woodruff v. Parham*,⁵ said: "Is the word 'impost,' here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the

Similar words presumed to have similar meaning.

⁵ (1868) 8 Wall. (U. S.) 123.

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Same words
used in
Articles of
Confederation.

ninth section, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not, at the same time, exported from the former. But if we give to the word 'imposts,' as used in the first-mentioned clause, the definition of Chief Justice Marshall, and to the word 'export' the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts." In the Articles of Confederation, also, it was provided that no State should lay any imposts or duties which might interfere with any stipulation in treaties entered into by the United States, and that no treaty of commerce should be made whereby the legislative power of the respective States should be restrained from imposing such imposts and duties on foreigners as their own people were subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; and "in these two articles," said the court further, "the words 'imports,' 'exports,' and 'imposts' are used with exclusive reference to foreign trade, because they have regard only to the treaty-making power of the federation." From the necessary interpretation of these clauses, and the fact that one of the chief reasons for assembling the Constitutional Convention was the necessity of vesting in Congress the power to levy duties on foreign goods and of imposing a restraint upon the States in that respect, the word "imports" in the clause under consideration must refer to goods imported from foreign countries and not to goods imported from

other States, and the word " exports " has a correlative meaning.⁶

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Words refer to property, not to persons.

The words refer to property, in regard to which some one is owner and is either the importer or exporter, and not to persons. The language of Article I, section 9, that " the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person," was relied on in *People v. Compagnie Générale Transatlantique*,⁷ to sustain a contention that the words " imports " and " exports " are applicable to persons as well as property. But Mr. Justice Miller said: " There has never been any doubt that this clause had exclusive reference to persons of the African race. The two words ' migration ' and ' importation ' refer to the different conditions of this race as regards freedom and slavery. When the free black man came here he migrated; when the slave came, he was imported. The latter was property, and was imported by his owner as other property, and a duty could be imposed on him as an import. We conclude that free human beings are not imports " within the meaning of the Constitution.⁸

⁶ See also *Austin v. Tennessee*, (1900) 179 U. S. 343; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, (1898) 171 U. S. 345; *Pittsburg, etc., Coal Co. v. Bates*, (1895) 156 U. S. 577; *Coe v. Errol*, (1886) 116 U. S. 517; *Brown v. Houston*, (1885) 114 U. S. 622.

⁷ (1882) 107 U. S. 59.

⁸ See *Crandall v. Nevada*, (1867) 6 Wall. (U. S.) 35; wherein it was held that while a statute of Nevada, imposing a capitation tax upon passengers leaving the State by the means furnished by common carriers, and requiring that the carriers should pay the

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Considered
in other
parts of
this work.

By reason of its close connection with the power granted to Congress to regulate commerce, and the resulting restriction on the taxing power of the States, the application of this express prohibition has occasionally arisen in particular connections, where it was urged that the taxation under consideration violated both clauses.⁹

tax, could not be declared a violation of the commerce clause or of the clause prohibiting a State from laying any imposts or duties on imports or exports, it was void as tending to embarrass the operations of the national government.

⁹ Consult the index under *Imports and Exports*, and see especially *infra*, pp. 292, 309, 322, 324.

CHAPTER XV.

DUTIES OF TONNAGE.

THE last clause of Article I, section 10, of the Federal Constitution, provides, in part, that

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“no State shall, without the consent of Congress, lay any duty of tonnage.” As to the power of Congress in this regard, Chief Justice Marshall, declaring that this is a restriction on the taxing power and not on the power to regulate commerce, said, in *Gibbons v. Ogden*:¹ “This tax may be imposed by a State, with the consent of Congress; and it may be admitted that Congress cannot give a right to a State, in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on Congress, without affording any implication respecting a power to regulate commerce. It is true that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the States from exercising this power.”

As a limitation on the taxing power.

A duty of tonnage within the meaning of the Constitution has been defined to be “a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country.”² Any

What constitutes a duty of tonnage.

¹ (1824) 9 Wheat. (U. S.) 1.

² Per Mr. Justice Field, in *Huse v. Glover*, (1886) 119 U. S. 543.

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charge or burden which in its essence is a contribution claimed for the privilege of entering a port or remaining in it, or departing from it, imposed by the authority of the State, is within the prohibition.³ As will be seen later, while a tax estimated on the tonnage is one of the tests, yet it is not a necessary element of a "duty of tonnage," as any tax for the privilege of entering a port and navigating the navigable waters of the State is, in a constitutional sense, a "duty of tonnage." By an Act of Congress⁴ the tonnage of a vessel is defined to be the entire internal cubical capacity, or contents of the ship or vessel expressed in tons of one hundred cubical feet each, as estimated by prescribed rules of admeasurement and computation.

Taxation of
vessels as
property.

On the question of the validity of the taxation of vessels according to their value as personal property by a city in which a company owning vessels has its principal office, Mr. Justice Clifford, speaking for the court in *Wheeling, etc., Transp. Co. v. Wheeling*,⁵ said that "tonnage duties on ships by the States are expressly prohibited, but taxes levied by a State upon ships or vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition, for the reason that the prohibition, when properly construed, does not extend to the investments of the citizens in such structures." But a tax on vessels plying in the navigable waters of a

³ *Keokuk Northern Line Packet Co. v. Keokuk*, (1877) 95 U. S. 80.

⁴ Act of May 6, 1864, c. 83, carried forward into section 4153, Rev. Stat. U. S., and amended by the Acts of August 5, 1882, c. 398, § 1; June 19, 1886, c. 421, § 5, and March 2, 1895, c. 173, § 1. See 7 Fed. Stat. Annot. 21.

⁵ (1878) 99 U. S. 273. See also *infra*, p. 279, note 3.

State, proportioned to the tonnage, is void as a tonnage tax as applied to vessels, duly enrolled and licensed under Acts of Congress, owned by a citizen of the State, and used exclusively in the transportation of freight and passengers between ports, points, or landings within the limits of the State, on navigable waters. To the suggestion that, in imposing such a tax, the legislature merely referred to the registered tonnage of the vessels as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties, the court, through Mr. Justice Clifford in the *State Tonnage Tax Cases*,⁶ said: "Suppose that could be admitted, it would not have much tendency to strengthen the argument for the defendant, as the suggestion concedes what is obvious from the schedule, that the taxes are levied without any regard to the value of the steamboats. But the proposition involved in the suggestion cannot be admitted, as, by the very terms of the act, the tax is levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents as ascertained by the rules of admeasurement and computation prescribed by the Act of Congress."

A New York statute providing that any vessel which should enter the port of New York, or load or unload or make fast to any wharf therein, should pay as fees a certain amount, according to the class of the vessel, to be computed from the tonnage expressed in the registers of enrolment of such vessels, was held to be objectionable as exacting a tax where there were no services rendered or offered to be

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Proportioned to
tonnage.

⁶ (1870) 12 Wall. (U. S.) 204.

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Fees
charged
when no
services
rendered.

rendered. Either of the three disjunctive conditions brought a vessel within the statute and made her liable to the burden prescribed.⁷ And a Louisiana statute enacted that the master and wardens of the port of New Orleans should be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called on to perform any service or not, for every vessel arriving in that port. The tax was held to be in a fair sense of the word a duty of tonnage, the court saying: "In the most obvious and general sense, it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition upon the States against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty of tonnage. It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."⁸

Wharfage

Wharfage, however, is not a duty of tonnage. The fact that the rates charged are graduated by the size or tonnage of the vessel is of no consequence in this connection.⁹ As was said by the court in

⁷ *Inman Steamship Co. v. Tinker*, (1876) 94 U. S. 238. See also *supra*, p. 205.

⁸ *Southern Steamship Co. v. Portwardens*, (1867) 6 Wall. (U. S.) 31.

⁹ *Onachita Packet Co. v. Aiken*, (1887) 121 U. S. 444; *Cincinnati, etc., Packet Co. v. Catlettsburg*, (1881) 105 U. S. 559; *North-*

Parkersburg, etc., Transp. Co. v. Parkersburg,¹
 “Whether a charge imposed is a charge of wharfage, or a duty of tonnage, must be determined by the terms of the ordinance or regulation which imposes it. They are not the same thing; a duty of tonnage is a charge for the privilege of entering, or trading or lying in, a port or harbor; wharfage is a charge for the use of a wharf. Exorbitant wharfage may have a similar effect as a burden on commerce as a duty of tonnage has; but it is exorbitant wharfage, and not a duty of tonnage; and the remedy for the one is different from the remedy for the other. The question whether it is the one or the other is not one of intent, but one of fact and law: of fact, as whether the charge is made for the use of a wharf, or for entering the port; of law, as whether, according as the fact is shown to exist, it is wharfage or a duty of tonnage. The intent is not material, and is not traversable.”

A municipal corporation of a State, having by the law of its organization an exclusive right to make wharves, collect wharfage, and regulate wharfage rates, can charge and collect wharfage proportioned to the tonnage of the vessels from the owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river. In *Keokuk Northern Line Packet Co. v. Keokuk*,² the court said: “The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them

Municipal
wharfage.

western Union Packet Co. v. St. Louis, (1879) 100 U. S. 423; *Vicksburg v. Tobin*, (1879) 100 U. S. 430.

¹ (1882) 107 U. S. 691.

² (1877) 95 U. S. 80.

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from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character." But in *Cannon v. New Orleans*,³ an ordinance imposing a tax so proportioned was held invalid, not because the charge was for wharfage, nor even because it was proportioned to the tonnage of the vessels, but because the charge was for stopping in the harbor though no wharf was used.

Tolls for
using im-
proved
waters.

In the same way that charges for wharfage, graduated by the tonnage within the meaning of the Constitution, are not duties of tonnage, the exaction of tolls for passing through improved waters, as compensation for the use of artificial facilities constructed, is not a tonnage duty though the rates are prescribed according to the tonnage of the vessels and the amount of freight carried.⁴

Ferry
license.

A license fee by a State either directly or through one of its municipal corporations upon the keepers of ferries living in the State, for boats owned by them and used in ferrying passengers and goods, is not a tonnage tax. Such a tax is levied on the ferry keeper and not on the ferry boat, and is not graduated by the tonnage of the ferry boats, being the same whether the boats are of large or small carrying capacity. This last, although not a conclusive circumstance, is one of the tests applied to determine whether a tax is a tax on tonnage or not.⁵

In *Morgan's Steamship Co. v. Louisiana Board*

³ (1874) 20 Wall. (U. S.) 577.

⁴ *Huse v. Glover*, (1886) 119 U. S. 543.

⁵ *Wiggins Ferry Co. v. East St. Louis*, (1882) 107 U. S. 365.

See also *infra*, p. 297.

of Health,⁶ it was held that a fee exacted for the examination which the quarantine laws of the State require in regard to all vessels passing a quarantine station is not a tonnage tax. Mr. Justice Miller, in delivering the opinion of the court in that case, said: "We are of opinion that the fee complained of is not a tonnage tax, that, in fact, it is not a tax within the true meaning of that word as used in the Constitution, but is a compensation for a service rendered, as part of the quarantine system of all countries, to the vessel which receives the certificate that declares it free from further quarantine requirements." But a tax on every vessel arriving at a quarantine station, whether any service is rendered or not, in order to defray the expenses of her quarantine regulations, assessed at five dollars for the first hundred tons of her capacity, and one and a half cents for every additional ton, is a tonnage tax.⁷

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Quarantine
fee.

When no
service
rendered.]

⁶ (1886) 118 U. S. 455.

⁷ *Peete v. Morgan*, (1873) 19 Wall. (U. S.) 581. See also as to inspection and quarantine charges and fees, *supra*, p. 105.

CHAPTER XVI.

TAXATION OF PROPERTY.

GENERAL POWER OF A STATE TO TAX PROPERTY WITHIN ITS LIMITS.

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Of prop-
erty used in
interstate
or foreign
commerce.

ORDINARY property taxes, upon property having a situs within its territory, may be taxed by a State,¹ though the property may be employed in interstate commerce.² A tax or other burden imposed upon the property of either a domestic or a foreign corporation because it is used to carry on interstate or foreign commerce is invalid as an interference with the power of Congress in the regulation of such commerce.³ But a State may tax all property, real and personal, within its borders, belonging to persons or foreign or domestic corporations, although employed in interstate or foreign commerce, to the same extent that other property within its jurisdiction is taxed.⁴

¹ Property in the shape of bonds and credits may be taxed. *State Board of Assessors v. Comptoir Nat. d'Escompte*, (1903) 191 U. S. 388; *New Orleans v. Stempel*, (1899) 175 U. S. 309; *Kirtland v. Hotchkiss*, (1879) 100 U. S. 491.

A tax imposed by a State statute on legacies is not void as to a legatee who is neither a citizen of the United States nor domiciled in that State. *Mager v. Grima*, (1850) 8 How. (U. S.) 490.

² *Atlantic, etc., Tel. Co. v. Philadelphia*, (1903) 190 U. S. 160.

³ *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 196.

⁴ *Western Union Tel. Co. v. Taggart*, (1896) 163 U. S. 1; *Pullman's Palace Car Co. v. Pennsylvania*, (1891) 141 U. S. 18; *Marye v. Baltimore, etc., R. Co.*, (1888) 127 U. S. 117; *Delaware Railroad Tax*, (1873) 18 Wall. (U. S.) 206.

In assessing such property for taxation, the State is not limited to the cost of the property, but may assess it on the value which it has as used and which results from its use, notwithstanding that its increased value may result from use in interstate commerce.⁵

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Value
resulting
from use in
commerce.

A State may levy a tax on the rolling stock and other movable personal property brought into and used in the State by a railroad company,⁶ sleeping car company,⁷ or refrigerator car company⁸ doing business therein, and where the specific and individual items of property so used and employed are not continuously the same but are constantly changing according to the exigencies of the business, the tax may be fixed by an appraisalment and valuation of the average amount of property thus habitually used.⁹

Rolling
stock and
movable
personal
property.

The State of Pennsylvania imposed taxes on tolls paid by one company to another for the use of its railroad, and the State Supreme Court thus defined the term "tolls," as used in the tax laws of that State: "Toll is a tribute or custom paid for passage, not for carriage — always something taken

Tolls re-
ceived for
use of rail-
road.

⁵ *Postal Tel. Cable Co. v. Adams*, (1895) 155 U. S. 688; *Cleveland, etc., R. Co. v. Backus*, (1894) 154 U. S. 439.

⁶ *Marye v. Baltimore, etc., R. Co.*, (1888) 127 U. S. 117.

⁷ *Pullman's Palace Car Co. v. Pennsylvania*, (1891) 141 U. S. 18; *Pullman's Palace Car Co. v. Twombly*, (1887) 29 Fed. Rep. 658.

⁸ *Union Refrigerator Transit Co. v. Kentucky*, (1905) 199 U. S. 194; *Union Refrigerator Transit Co. v. Lynch*, (1900) 177 U. S. 149; *American Refrigerator Transit Co. v. Hall*, (1899) 174 U. S. 70.

⁹ When the complaint contained no averment as to the average number of cars used in the State, the court said: "The presumption is that the action of the taxing officers was correct and regular, and that the number of cars assessed by the State board of equalization was the average number used and employed by plaintiff in error in the State of Utah during 1897." *Union Refrigerator Transit Co. v. Lynch*, (1900) 177 U. S. 149.

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for a liberty or privilege, not for a service; and such is the common understanding of the word. Nobody supposes that tolls taken by a turnpike or canal company include charges for transportation, or that they are anything more than an excise demanded and paid for the privilege of using the way." In holding the tax to be valid, Mr. Justice Shiras, speaking for the court in *New York, etc., R. Co. v. Pennsylvania*,¹ said: "The tax complained of is not laid on the transportation of the subjects of interstate commerce, or on receipts derived therefrom, or on the occupation or business of carrying it on. It is a tax laid upon the corporation on account of its property in a railroad, and which tax is measured by a reference to the tolls received. The State has not sought to interfere with the agreement between the contracting parties in the matter of establishing the tolls. Their power to fix the terms upon which the one company may grant to the other the right to use its road is not denied or in any way controlled. It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance."

Value of
telegraph
company's
property.

In estimating the value of the property of a telegraph company situate within a State, it may be regarded not abstractly or strictly locally, but

¹ (1895) 158 U. S. 431.

as a part of a system operated in other States, and a State is not precluded from taxing the property because the State had not created the company or conferred a franchise upon it, or because the company has derived rights or privileges under an Act of Congress, or is engaged in interstate commerce.²

A ship or vessel engaged in interstate or foreign commerce may be taxed as other personal property,³

*Ships or
vessels.*

² *Western Union Tel. Co. v. Missouri*, (1903) 190 U. S. 412. See further, *infra*, p. 282.

A statute imposing a tax equal to one dollar per mile for the line of poles and first wire and fifty cents for each additional wire was considered to be invalid as fixing arbitrary sums without regard to the value of the property, and as in effect a tax on the privilege of doing business in the State. *Com. v. Smith*, (1891) 92 Ky. 38.

A remedy by injunction directing the officers and agents of a telegraph company to desist from the prosecution of its business until taxes are paid would violate the provisions of an Act of Congress which says that the company accepting its provisions "shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States." If a resort to a judicial proceeding to collect a tax is deemed expedient, there remain to the court all the ordinary means of enforcing its judgment — executions, sequestration, and any other appropriate remedy in chancery. *Western Union Tel. Co. v. Atty.-Gen.*, (1888) 125 U. S. 530.

³ The enrolment of a ship or vessel does not exempt the owner of the same from taxation for his interest in the ship or vessel as property, upon a valuation of the same, as in the case of other personal property. *Wheeling, etc., Transp. Co. v. Wheeling*, (1878) 99 U. S. 273. See also *Old Dominion Steamship Co. v. Virginia*, (1905) 198 U. S. 299; *Moran v. New Orleans*, (1884) 112 U. S. 69.

A tax on money or capital invested in shipping is valid. *People v. Tax, etc., Com'rs*, (1866) 48 Barb. (N. Y.) 157; *Perry v. Torrence*, (1838) 8 Ohio 521; *State v. Charleston*, (1851) 4 Rich. L. (S. Car.) 286.

The power of the States to tax vessels engaged in commerce is limited by the clause of Article I, section 10, of the Constitution, providing that "no State shall, without the consent of Congress, lay any duty of tonnage." See *Moran v. New Orleans*, (1884) 112 U. S. 69; *State Tonnage Tax Cases*, (1870) 12 Wall. (U. S.) 204.

See also *supra*, p. 270.

Chapter
XVI.Artificial
situs.

but there must be a situs for the purpose of taxation. Section 4141, Rev. Stat. U. S., provides: "Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection-district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides." This section creates what may be called the home port of the vessel,—an artificial situs which may control the place of taxation in the absence of an actual situs elsewhere. In *Hays v. Pacific Mail Steamship Co.*,⁴ ocean steamers owned and registered in New York and regularly plying between Panama and San Francisco and ports in Oregon, remaining in those ports no longer than was necessary to land and receive passengers and cargo and for repairs and supplies, were held not to be subject to taxation in California, but at the artificial situs established by their registry.⁵ And in *St. Louis v. Wiggins Ferry Co.*,⁶ it was held that certain ferry boats belonging to an Illinois corporation and plying between East St. Louis, Illinois, and St. Louis, Missouri, were not taxable in the latter State, but at their home port in the former State, the court saying that a tax was void when there was no jurisdiction as to the property taxed.

⁴ (1854) 17 How. (U. S.) 596.

⁵ See also *Morgan v. Parham*, (1872) 16 Wall. (U. S.) 471, as to a steamship registered in New York, and employed as a coasting steamer between Mobile and New Orleans, and regularly enrolled as a coaster in Mobile. It was held that she was not subject to taxation by the State of Alabama.

⁶ (1870) 11 Wall. (U. S.) 423.

But where a vessel, though engaged in interstate commerce, is employed in such commerce wholly within the limits of a State, it is subject to taxation in that State. Being engaged wholly within the limits of a State, it has an actual situs there for the purposes of taxation, although it may have been registered or enrolled at a port in another State.⁷

A State may also tax the property of a bridge company, erected over one of the navigable waters of the United States. The fact that a bridge between low-water marks on either side of the river is used for purposes of interstate commerce does not exempt it from taxation,⁸ and its erection under the authority or with the consent of Congress,⁹ and the declaration of Congress that railway bridges over navigable rivers shall be regarded as post roads, do not interfere with the right of the State to impose taxes.¹ In the case of a bridge over a river dividing two States, each State may tax that part of the bridge within its limits, and when the dividing line between the two is the middle of the stream, it is a question of fact where that line divides a bridge, and it is not within the province of the Supreme Court of the United States to review the findings of the State courts in regard to the part assessed in the State.²

⁷ *Old Dominion Steamship Co. v. Virginia*, (1905) 198 U. S. 299.

Dredges employed in the improvement of navigable waters are subject to taxation though owned by a corporation organized in another State. *McRae v. Bowers Dredging Co.*, (1898) 90 Fed. Rep. 360.

⁸ *Henderson Bridge Co. v. Henderson*, (1891) 141 U. S. 679.

⁹ *Henderson Bridge Co. v. Henderson*, (1899) 173 U. S. 592.

¹ *Henderson Bridge Co. v. Kentucky*, (1897) 166 U. S. 150.

² *Keokuk, etc., Bridge Co. v. Illinois*, (1900) 175 U. S. 626.

In *Henderson Bridge Co. v. Henderson*, (1899) 173 U. S. 592, the court said that whether a municipal corporation in the State of

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APPLICATION OF THE UNIT RULE.

Proportion
of whole
value as a
basis for
taxation.

As to railroad, telegraph, sleeping car, and express companies, engaged in interstate commerce, their property, in the several States through which their lines or business extend, may be valued as a unit for the purposes of taxation, taking into consideration the uses to which it is put and all the elements making up aggregate value, and a proportion of the whole fairly and properly ascertained may be taxed by the particular State, without violating any federal restriction. The valuation is thus not confined to the roadbed, ties, rails, and spikes of the railroad company, or to the horses, wagons, and furniture of the express company, or to the poles, wires, and instruments of the telegraph company, or to the cars of the sleeping car company; but includes the proportionate part of the value resulting from the combination of the means by which the business is carried on, a value existing to an appreciable extent throughout the entire domain of operation. The rule applies to both domestic and foreign corporations.³

Mode of
ascertain-
ing value—
Railroads.

A proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of rail-

Kentucky had authority to tax so much of the property of a bridge company as was permanently between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio river depended primarily upon the question whether the boundary of Kentucky extended to low-water mark on the Indiana shore. It had been settled, in *Handly v. Anthony*, (1820) 5 Wheat. (U. S.) 374, and in *Indiana v. Kentucky*, (1890) 136 U. S. 479, as to the boundary between Kentucky and Indiana, that the jurisdiction of Kentucky extends to the low-water mark on the Indiana shore of the Ohio river.

³ *Pullman's Palace Car Co. v. Pennsylvania*, (1891) 141 U. S. 18.

roads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole;⁴ in the case of a telegraph company, to take such proportion of the whole value of the capital stock as the length of its lines within a State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State;⁵ and in the case of a sleeping car company, to take such proportion of the capital stock as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States.⁶

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Telegraph
company.

Sleeping-
car com-
pany.

In the case of express companies, a rule to be followed by a State board in making the assessment, that "in determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as

Express
company.

⁴ *Cleveland, etc., R. Co. v. Backus*, (1894) 154 U. S. 439.

The rule was followed in ascertaining the value of movable property, and sustained, in *Pittsburgh, etc., R. Co. v. Backus*, (1894) 154 U. S. 421. See also *Maine v. Grand Trunk R. Co.*, (1891) 142 U. S. 217, as to a unit method of taxing the gross receipts.

⁵ *Western Union Tel. Co v. Taggart*, (1896) 163 U. S. 1.

⁶ *Pullman's Palace Car Co. v. Pennsylvania*, (1891) 141 U. S. 18.

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aforesaid," was held to be valid.⁷ Upon a petition for a rehearing, this principle of taxation was reaffirmed. Mr. Justice Brewer wrote the opinion of the court, and referred to the fact that in the city of New York were located the headquarters of the corporation, whose corporate property was confessedly of the value of \$16,000,000 — a value which could be realized by its stockholders at any moment they saw fit; that its tangible property and its business were scattered through many States, all whose powers could be invoked to protect its property from trespass and secure it in the peaceful transaction of its widely dispersed business; and that the tangible property was worth only \$4,000,000. Answering the contention that the value of the tangible property in such a case is the limit of the combined taxing power of the States in which the corporation operates, the learned justice pointed out the injustice of asking those States to protect property having such a high actual value, and limiting their taxing power to the value of the tangible property, and said that "courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no finespun theories about situs should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires."⁸

The fact that a telegraph company, whether domestic or foreign, has accepted the provisions of

⁷ *Adams Express Co. v. Ohio State Auditor*, (1897) 165 U. S. 194. See also *Adams Express Co. v. Kentucky*, (1897) 166 U. S. 171.

⁸ *Adams Express Co. v. Ohio State Auditor*, (1897) 166 U. S. 185.

the Act of Congress of July 24, 1866, ch. 230, now embodied in §§ 5263-5269, Rev. Stat. U. S., does not exempt it from the operation of a statute of a State in which it owns a line of telegraph, requiring it to be there taxed on such proportion only of the whole value of its capital stock as the length of its line in that State bears to the length of its lines everywhere; and to prevent its whole tax in that State from amounting in any event to more than that, it is provided that from the taxable portion of the value of its capital, so ascertained, shall be deducted the value of any property owned by it in that State which is subject to local taxation in the cities and towns.⁹ In *Western Union Tel. Co. v. Atty.-Gen.*,¹ the court said that the franchise of such a company to be a corporation was derived not from the Act of Congress, but from the laws of the State under which it was organized, and that "it never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

In defining what is meant by valuation as a unit for the purpose of taxation, the court, especially referring to express companies, in the *Adams Express Co. v. Ohio State Auditor* case,² said: "The unit is a unit of use and management, and the horses,

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Effect of
Act of Con-
gress au-
thorizing
telegraph
company to
occupy posi-
roads, etc.

Valuation
as unit de-
fined —
Unit of use.

⁹ *Massachusetts v. Western Union Tel. Co.*, (1891) 141 U. S. 40.

¹ (1888) 125 U. S. 530.

² (1897) 165 U. S. 194.

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wagons, safes, pouches, and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others. We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business.” The same principle undoubtedly applies in the case of telegraph companies.

Excep-
tional cases
of valuable
terminal
facilities.

There may be exceptional cases, as for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two of track in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect is presented by a railroad company to a State board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the State, took into account the peculiar and large value of such facilities and such extra rolling stock. But whether in any particular case such matters are taken into consideration by the assessing board does not affect the validity of the law, when the law does not require that the valuation of the prop-

erty within the State shall be absolutely determined upon a mileage basis.³

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TAXATION OF GROSS RECEIPTS.

The question of the power of a State to tax the gross receipts of a corporation engaged in interstate commerce was first presented in *State Tax on Railway Gross Receipts*.⁴ The State of Pennsylvania imposed a tax upon the gross receipts of certain transportation companies, and in this particular case taxed the gross receipts of a railroad company, chartered by the State, derived partly from the freight of goods transported wholly within the State, and partly from the freight of goods exported to points without the State, which latter were discriminated from the former in the reports made by the company. The validity of the tax was sustained on the ground, among others, that the tax, being collectible only once in six months, was laid upon a fund which had become the property of the company, mingled with its other property, possibly expended in improvements, or otherwise invested. In *Fargo v. Michigan* ⁵ it was held that a State tax on the gross receipts of a foreign railroad corporation from interstate transportation is a burden on interstate commerce. In this case the court explained the case of *State Tax on Railway Gross Receipts, supra*, but distinctly overruled it in *Philadelphia, etc., Steamship Co. v. Pennsylvania*,⁶ wherein it was held that a tax upon the gross receipts of a steam-

States without power to tax receipts from interstate and foreign commerce.

Course of decisions.

³ Pittsburgh, etc., R. Co. v. Backus, (1894) 154 U. S. 421. See also Cleveland, etc., R. Co. v. Backus, (1894) 154 U. S. 439.

⁴ (1872) 15 Wall. (U. S.) 284.

⁵ (1887) 121 U. S. 230.

⁶ (1887) 122 U. S. 326.

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ship company, incorporated under the laws of the taxing State, derived from the transportation of persons and property by sea, between different States, and to and from foreign countries, is a burden upon interstate and foreign commerce.

On intra-
state re-
ceipts.

Nevertheless, a State may levy a tax on the receipts of an interstate corporation, whether it be a domestic corporation,⁷ or one organized under the laws of another State,⁸ when the statute confines the tax to the intrastate business, and in no way relates to the interstate business of the company.⁹ In *Maine v. Grand Trunk R. Co.*¹ it was held that the imposition of a tax on a foreign railroad corporation, operating a railroad partly within and partly without the State, levied upon the receipts ascertained by dividing the gross transportation receipts over its whole extent by the total number of miles operated, to obtain the average gross receipts per mile, and taking the gross receipts in the State to be the average gross receipts per mile multiplied by the number of miles operated within the State, was not a regulation of interstate and foreign commerce, the court saying that a resort to the receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the privilege tax which should be levied.

⁷ *Lehigh Valley R. Co. v. Pennsylvania*, (1892) 145 U. S. 192. See also the discussion *supra*, p. 151, as to the separability of the receipts on domestic from receipts on interstate transportation.

⁸ *Pacific Express Co. v. Seibert*, (1892) 142 U. S. 339.

⁹ A State may tax transportation within the State when in its course it passes through another State than that of its origin and destination, if there is no breaking of bulk or transfer of passengers in the other State. *Lehigh Valley R. Co. v. Pennsylvania*, (1892) 145 U. S. 192.

See *supra*, p. 156.

¹ (1891) 142 U. S. 217.

A single tax assessed upon receipts derived partly from interstate commerce and partly from commerce within the State, but which have been returned and assessed in gross and without separation and apportionment, is not wholly invalid. Such a tax is invalid only in proportion to the extent that such receipts were derived from interstate commerce, and when the means are presented whereby the receipts arising from commerce wholly within the State, and from that which was interstate, can be separated, the tax may be levied on the domestic receipts.²

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Separability of intrastate from interstate tax.

The State of Maryland granted to the Baltimore and Ohio Railroad Company the right to make a branch or lateral road from Baltimore to Washington, with a stipulation in the charter that the company should, at the end of every six months, pay to the State one-fifth of the whole amount which might be received for the transportation of passengers. In holding that this was not a violation of the commerce clause, the court, in *Baltimore, etc., R. Co. v. Maryland*,³ speaking through Mr. Justice Bradley, said: "So long, therefore, as it is conceded (as it seems to us it must be) that the power to charge for transportation, and the amount of the charge, are absolutely within the control of the State, how can it matter what is done with the money, whether it goes to the State or to the stockholders of a private corporation? As before said, the State could have built the road itself and charged

Stipulation in charter for tax on receipts.

² *Western Union Tel. Co. v. Alabama State Board of Assessment*, (1889) 132 U. S. 472; *Ratterman v. Western Union Tel. Co.*, (1888) 127 U. S. 411.

³ (1874) 21 Wall. (U. S.) 456.

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any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ, in a constitutional point of view, when it authorizes its private citizens to build the road and reserves for its own use a portion of the earnings? We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the State, as a consideration of the franchise, had stipulated that it should have all the passenger money, and that the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It is simply the exercise by the State of absolute control over its own property and prerogatives." But Mr. Justice Harlan, in *Northern Securities Co. v. U. S.*,⁴ referring to the *Baltimore, etc., R. Co. v. Maryland* case, *supra*, said: "In the case just referred to the court does not say, and it is not to be supposed that it will ever say, that any power exists in a State to prevent the enforcement of a lawful enactment of Congress, or to invest any of its corporations, in whatever business engaged, with authority to disregard such enactment or defeat its legitimate operation. On the contrary, the court has steadily held to the doctrine, vital to the United States as well as to the States, that a State enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the Acts of Congress enacted in pursuance of its provisions."

⁴ (1904) 193 U. S. 197.



TAXATION OF GOODS.

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XVI.While
actually
in transit.

Property actually in transit from one State to another State is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities.⁵ In *Brown v. Houston*⁶ it was held that coal mined in Pennsylvania and sent by water to New Orleans to be sold in the open market there on account of the owners in Pennsylvania, and lying at New Orleans in flatboats for sale, became intermingled, on its arrival there, with the general property of the State, and was subject to taxation under the general laws of Louisiana, although it might have been, after arrival, sold from the vessel on which the transportation was made, without being landed, and for the purpose of being taken out of the country by a vessel bound to a foreign port.⁷

The products of a State, though intended for exportation to another State, and partially prepared

Intended
for export.

⁵ *Kelley v. Rhoads*, (1903) 188 U. S. 1, holding that a flock of sheep, driven without unnecessary delay across a State for shipment, and not for the purpose of grazing, was exempt from taxation by the State through which it was being transported.

A State may tax property brought into the State merely for the purpose of undergoing a partial process of manufacture. *Standard Oil Co. v. Combs*, (1884) 96 Ind. 179.

A stamp tax on bills of lading for the transportation to any point outside the State is a tax on the goods, and, when the goods are being exported to a foreign country, is a tax on exports within the prohibition of the clause of Article I, section 10, providing that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports." *Almy v. California*, (1860) 24 How. (U. S.) 169.

⁶ (1885) 114 U. S. 622.

⁷ See also *Pittsburg, etc., Coal Co. v. Bates*, (1895) 156 U. S. 577.

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for that purpose by being deposited at a place or port of shipment within the State, are liable to be taxed like other property within the State. The rule in relation to the products of a State intended for exportation to a foreign country or to another State, as to the point of time at which the taxing power of the State over them terminates, is that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation, or have been started upon such transportation in a continuous route or journey.⁸

Imports
from
foreign
countries.

In considering the power of the States to tax imported goods while in the original packages and in the possession of the importer, it has to be borne in mind that the clause of section 10, Article I, providing, in part, that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," creates a distinction in this regard between goods imported from foreign countries and from other States. The word "imports" in the clause quoted applies only to articles imported from foreign countries,⁹ and is an absolute prohibition of State taxation of goods imported from foreign countries while they are in the original packages and before they have, by the act of the

⁸ *Coe v. Errol*, (1886) 116 U. S. 517, holding that logs, which had been drawn down to the place from which they were to be transported, there to remain until it should be convenient to send them to their destination, were taxable by the State.

See also *Diamond Match Co. v. Ontonagon*, (1903) 188 U. S. 82. And see also as to duration of federal protection, *supra*, p. 152.

⁹ *Patapsco Guano Co. v. North Carolina Board of Agriculture*, (1898) 171 U. S. 345.

importer, become incorporated in the mass of property of the State and are held for sale,¹ but when the importer sells the imported articles, or otherwise mixes them with the general property of the State by breaking up the packages, they become incorporated with the mass of property and are subject to State taxation.²

On the other hand, a different rule obtains with respect to articles transported from one State to another. In such cases, there is no positive prohibition like that against taxation of imports from foreign countries, and the States have the power, after the goods imported from other States have reached their destination and are held for sale, to tax them, without discrimination, like other property within the State.³

Transported from
one State
to another.

¹ *May v. New Orleans*, (1900) 178 U. S. 496; *Low v. Austin*, (1871) 13 Wall. (U. S.) 29. See also *infra*, p. 309, as to the right to impose a license tax for the privilege of selling such goods.

² *Waring v. Mobile*, (1868) 8 Wall. (U. S.) 110.

When original packages of imported goods have been sold, and the proceeds have become assets of the importer, in the shape of credits and bills receivable, the property must be regarded as having lost its distinctive character as an import and having become mixed with the mass of the importer's property. *People v. Wells*, (1905) 107 N. Y. App. Div. 15, *affirmed* (1896) 184 N. Y. 275.

³ *American Steel, etc., Co. v. Speed*, (1904) 192 U. S. 500.

CHAPTER XVII.

PRIVILEGE AND OCCUPATION TAXES.

ON THE BUSINESS OF ENGAGING IN TRANSPORTATION.

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IT may be stated as a rule of general application, that no State can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce.¹

Business of
transport-
ing passen-
gers and
freight.

The business of transporting passengers² and freight³ into, through, or out of a State cannot be subjected to taxation by the State.

¹ *Atlantic, etc., Tel. Co. v. Philadelphia*, (1903) 190 U. S. 160.

In *Crandall v. Nevada*, (1867) 6 Wall. (U. S.) 35, it was held that a State capitation tax upon every person leaving the State, or passing through it, by any common carrier, was not void as a regulation of commerce, but, as the operation of such a statute would embarrass the operations of the national government, it was held void.

A license tax for the privilege of fishing in State waters (*Morgan v. Com.*, (1900) 98 Va. 812), or on the business of canning or packing oysters (*Applegarth v. State*, (1899) 89 Md. 140; *State v. Applegarth*, (1895) 81 Md. 293), is valid.

To carry on the business of collecting soiled clothing and sending it to another State to be laundered and returned, a license may be required. *Smith v. Jackson*, (1899) 103 Tenn. 673. But see *Com. v. Pearl Laundry Co.*, (1899) 105 Ky. 259.

² *Pickard v. Pullman Southern Car Co.*, (1886) 117 U. S. 34, *overruling* *Pullman Southern Car Co. v. Gaines*, (1877) 3 Tenn. Ch. 587; *Tennessee v. Pullman Southern Car Co.*, (1886) 117 U. S. 51, *affirming* (1884) 22 Fed. Rep. 276; *Henderson v. New York*, (1875) 92 U. S. 259; *Passenger Cases*, (1849) 7 How. (U. S.) 283. But see *New York v. Miln*, (1837) 11 Pet. (U. S.) 102.

³ The invalidity of a State tax on interstate and foreign commerce is not cured by including, in the provisions of the statute

This does not, however, prevent a State from levying a franchise tax upon a railroad company for the privilege of maintaining a separate, independent local service, preliminary or subsequent to any interstate transportation. This is illustrated by the case of *New York v. Knight*.⁴ The Pennsylvania Railroad Company had established a cab stand on its own premises at the Twenty-third street ferry in the city of New York, and maintained a service of cabs and coaches under special licenses from the city of New York, whereby they could stand on those premises only. The sole business done by those cabs and coaches was to bring the company's passengers to and from its ferry from Twenty-third street to Jersey City. The charges for this service were separate from those of the company for further transportation, and no part of its receipts from the cab service was received as compensation for any service outside the State of New York. It was held that the State tax on the cab service was valid though it had not been profitable to the company, but had been operated at a loss.

While the privilege of carrying on an interstate transportation business cannot be taxed, a State statute laying a tax upon a transportation company, which in terms applies strictly to business done in the transportation of passengers taken up at one point in the State and transported wholly within the State to another point therein, is not an interference with interstate commerce. In *Allen v. Pullman's Palace Car Co.*⁵ it was argued that the

imposing it, the same or a like tax on domestic commerce. *State Freight Tax Case*, (1872) 15 Wall. (U. S.) 232, reversing *Tonnage Tax Cases*, (1869) 62 Pa. St. 286.

⁴ (1904) 192 U. S. 21.

⁵ (1903) 191 U. S. 171.

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tax collected for carrying one or more local passengers on cars operating within the State was assessed upon traffic which bore such small proportion to the entire business of the company within the State, that it could not have been levied in good faith upon purely local business, and was but a thinly disguised attempt to tax the privilege of interstate traffic. Upon a similar contention in *Pullman Co. v. Adams*,⁶ the court said that as, under the law of the State, the company had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, it could not complain of being taxed for the privilege of doing a local business which it was free to renounce.⁷ The same principle has been applied in the case of express companies. So long as the taxation of the business of an express company does not apply to or affect in any manner the business which is interstate in character, but applies to and affects only the business which is done within the State, it is valid.⁸

Licensing
vessel-
owners.

A State and its municipalities cannot exact a license from an owner of vessels duly enrolled and licensed under the laws of the United States and employed in the coasting trade, for the privilege

⁶ (1903) 189 U. S. 420.

⁷ "If the payment of this tax was compulsory upon the company before it could do a carrying business within the State, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection." *Allen v. Pullman's Palace Car Co.*, (1903) 191 U. S. 171.

⁸ *Osborne v. Florida*, (1897) 164 U. S. 654.

In *Osborne v. Mobile*, (1872) 16 Wall. (U. S.) 479, it was held that a municipal ordinance was not invalid in requiring payment of a license for the privilege of transacting in that city a business extending beyond the limits of the State. But the case was overruled in *Leloup v. Mobile*, (1888) 127 U. S. 640.

of navigating a navigable stream within the State unless the license is a charge by way of compensation for a specific improvement.⁹ The question of the power of a State or municipal corporation to levy a license upon the keepers of ferries was discussed in *St. Clair County v. Interstate Sand, etc., Transfer Co.*,¹ wherein it was held that a municipal corporation could not require a license from a ferry company for transporting railroad cars across a river between two States. Among other cases, the court referred to *Gloucester Ferry Co. v. Pennsylvania*,² and *Wiggins Ferry Co. v. East St. Louis*.³ In the first of those cases it was held that a ferry company, incorporated and domiciled in New Jersey, carrying on a ferry business over the Delaware river between Camden, New Jersey, and Philadelphia, and owning a wharf or slip at which its boats landed, could not be taxed for the privilege of receiving and landing passengers and freight at its wharf in Philadelphia. In the second case, the ferry company was in the enjoyment of a ferry franchise to operate across the Mississippi river between Illinois and Missouri. The company was domiciled in Illinois, that State being the situs of its boats and other property, and it was held that the exaction of a license tax by a municipal corporation in Illinois for the privilege of ferrying across the river between the two States was not repugnant to

⁹ *Harman v. Chicago*, (1893) 147 U. S. 396, *reversing* (1892) 140 Ill. 374; *Moran v. New Orleans*, (1884) 112 U. S. 69.

A State tax on immigrants arriving from foreign ports is a regulation of commerce with foreign nations. *People v. Compagnie Générale Transatlantique*, (1882) 107 U. S. 59.

¹ (1904) 192 U. S. 454.

² (1885) 114 U. S. 196.

³ (1882) 107 U. S. 365.

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the commerce clause. It will be noticed that the *St. Clair County* case, *supra*, limits the application of the *Wiggins Ferry* case, *supra*, and that this case seems to have been decided upon the idea that the tax was in the nature of a tax on property having a situs within the State.⁴

For privilege of keeping an office.

A license tax cannot be imposed upon a foreign corporation for the privilege of keeping an office in the State used to facilitate the transaction of its interstate commerce,⁵ but, within the principle recognized and heretofore stated, that the privilege of carrying on the domestic part as distinguished from interstate business may be taxed, it has been held that a State may impose a tax for the privilege of keeping an office in the State when there is transacted at that office intrastate as well as interstate business.⁶

On an agency established to facilitate interstate business.

A statute or municipal ordinance requiring a transportation agency to pay a license tax as a condition to doing any business in the State is invalid as to an agency of a foreign corporation doing an interstate business.⁷ In *McCall v. California*,⁸ it was held that a railroad agency could not be required to pay a municipal license tax on the business of soliciting interstate traffic. In the particular case, the person was an agent in the city of San

License tax on railroad agency—Soliciting interstate traffic.

⁴ See also as to duties of tonnage, *supra*, p. 274.

⁵ *Norfolk, etc., R. Co. v. Pennsylvania*, (1890) 136 U. S. 114.

A license tax may be imposed upon a foreign corporation for the privilege of keeping an office in the State when such corporation is not engaged in interstate commerce. *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*, (1888) 125 U. S. 181.

⁶ *Atty.-Gen. v. Electric Storage Battery Co.*, (1905) 188 Mass. 239.

⁷ See *Crutcher v. Kentucky*, (1891) 141 U. S. 47, as to agents of express companies, and *Clyde Steamship Company v. Charleston*, (1896) 76 Fed. Rep. 46, as to steamship agencies.

⁸ (1890) 136 U. S. 104.

Francisco, California, for a railroad company operating a continuous line of road between Chicago and New York, and the only duty he was required to perform was to induce people contemplating taking a trip East to be booked over the line he represented. The court, Mr. Justice Lamar delivering the opinion, said: "The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the 'means' by which the company sought to increase and doubtless did increase its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple." The principle that when a tax is laid not in terms upon the domestic business, but is a gross sum imposed, regardless of the fact that the greater portion of the business may be interstate in character, the construction of the State court will be accepted as in reality a part of the statute itself, was applied in *Kehrer v. Stewart*,⁹ as to a municipal tax on the distributing agent of a packing house shipping dressed meats into the State, when the record did not show what proportion of such business was interstate and what proportion was domestic. The tax was held to be valid, and Mr. Justice Brown, delivering the opinion of the court, said: "If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago, upon an order filled there, refused the

Construction of statute by State court — Limiting tax to domestic business.

⁹ (1905) 197 U. S. 60.

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goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in *Crutcher v. Kentucky*, (1891) 141 U. S. 47; but if the agent carried on a definite, though a minor, part of his business in the State by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business."

ON TELEGRAPH AND TELEPHONE COMPANIES.

As a condition to doing business in the State.

On domestic business.

A State cannot exact a license tax from a telegraph company, doing an interstate as well as a domestic or internal business, as a condition to doing business within the State,¹ but such a tax upon a telegraph company on business done exclusively within the State, and not including any interstate or government business, is an exercise of the police power, and not an interference with interstate commerce.² When a State imposes an occupation tax in the way of a tax on messages generally, so far

¹ *Leloup v. Mobile*, (1888) 127 U. S. 640, *reversing* (1884) 76 Ala. 401.

² *Postal Tel. Cable Co. v. Charleston*, (1894) 153 U. S. 692, *affirming* (1893) 56 Fed. Rep. 419.

as it operates on private messages sent out of the State, it is beyond the power of the State, and whether such a law can be used to enforce the collection of the tax on messages sent by private parties from one place to another exclusively within its own jurisdiction, is a question entirely within the jurisdiction of the courts of the State.³

The advantages or privileges that are conferred upon telegraph companies by Acts of Congress are in the line of authority to construct and maintain lines as means or instruments of commerce, and are not necessarily inconsistent with a right on the part of the States in which business is done and property acquired to tax the same within the limitations of constitutional restrictions, as in the case of imposing a license tax on business done exclusively within the State.⁴

Effect of
privileges
conferred
by Act of
Congress.

Municipal taxation of the poles and wire belonging to a telegraph company using the streets of a city is not a regulation of commerce if it is reasonable. Under the Acts of Congress respecting the use of the post roads of the United States the occupation of the streets by a telegraph company cannot be denied by the municipal corporation, but a sum may be charged on each pole erected as compensation in the nature of rental for the use of the street.⁵ And so a license fee of a certain amount per pole and per mile of wire may be imposed to cover the cost of local governmental supervision.⁶ As has

On poles
and wire
— Rental
and super-
vision.

³ *Western Union Tel. Co. v. Texas*, (1881) 105 U. S. 460.

⁴ *Postal Tel. Cable Co. v. Charleston*, (1894) 153 U. S. 692.

⁵ *St. Louis v. Western Union Tel. Co.*, (1893) 148 U. S. 92.

⁶ *Atlantic, etc., Tel. Co. v. Philadelphia*, (1903) 190 U. S. 160;
Western Union Tel. Co. v. New Hope, (1903) 187 U. S. 419.

Though the telegraph company has no office in the borough, a municipal corporation may impose such a license fee for each pole

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ableness
varies in
different
municipal-
ities.

been said, the charges in such cases must be reasonable,⁷ but an ordinance imposing a fee for supervision must be taken as *prima facie* reasonable.⁸

The question of reasonableness is one of fact and cannot be the same in one city as in another. What is reasonable in one municipality may be oppressive and unreasonable in another.⁹ In *Postal Tel.-Cable Co. v. Taylor*¹ it was held that the ordinance in question imposed an unreasonable license fee. It appeared from the affidavit of defense that the license fees imposed by the ordinance were not based upon the cost and expense to the borough for inspection and supervision or regulation of the defendant's lines and business, but the fees were imposed notwithstanding they were more than twenty times the amount that might have been or could

and mile of wire within its limits. *Taylor v. Postal Tel. Cable Co.*, (1902) 202 Pa. St. 584.

⁷ A municipal ordinance charging the sum of five dollars per annum as rental for each and every telegraph or telephone pole erected or used in the streets in the city, cannot be assumed to be so excessive as to be unreasonable and void. *St. Louis v. Western Union Tel. Co.*, (1893) 148 U. S. 92, *rehearing denied* *St. Louis v. Western Union Tel. Co.*, (1893) 149 U. S. 465. See also *Postal Tel. Cable Co. v. Baltimore*, (1895) 156 U. S. 210, as to two dollars per pole rental fee.

A municipal charge of one dollar per annum for each pole and of two dollars and fifty cents per mile of wires suspended above ground was held to be unreasonable in *Philadelphia v. Western Union Tel. Co.*, (1897) 82 Fed. Rep. 797.

⁸ *Western Union Tel. Co. v. New Hope*, (1903) 187 U. S. 419.

⁹ *Atlantic, etc., Tel. Co. v. Philadelphia*, (1903) 190 U. S. 160. See *Postal Tel. Cable Co. v. New Hope*, (1904) 192 U. S. 55, wherein, the jury having found a verdict for a sum less than the amount of the tax claimed, it was held that the court should have entered judgment for the defendant declaring the ordinance unreasonable and void. Upon finding the ordinance unreasonable, it was not the province of the jury to assess a tax and render verdict for the amount it might judge reasonable.

¹ (1904) 192 U. S. 64.

possibly be incidental to such inspection, supervision, and regulation, together with all reasonable measures and precautions that might have been or possibly could be required to be taken by the borough for the safety of its citizens and the public, or which might have been or possibly could be incurred as expenses for the most careful, thorough, and efficient inspection and supervision that might have been made of the poles and wires of the company, and that the borough had not discharged or attempted to discharge its duty of inspecting the poles and wires for the purpose of seeing that they were safe. The court, its opinion being delivered by Mr. Justice Peckham, said: "We assume that a tax of this kind ought to be large enough to cover all expenses of police supervision of the property and instrumentalities used by the company in the borough, and that it is not bound to furnish such supervision for nothing, but may, in addition to ordinary property taxation, subject the corporation to a charge for the expenses of the supervision. The borough is also not compelled to make its expenditures for these purposes in advance of demanding the tax from the defendant, but it must be remembered that such a tax is authorized only in support of police supervision, and if it were possible to prove in advance the exact cost, that sum would be the limit of the law. As in the nature of things this is ordinarily impossible, the municipality is at liberty to make the charge enough to cover any reasonably anticipated expenses, and the payment of the fee cannot be avoided because it may subsequently appear that it was somewhat in excess of the actual expense of the supervision, nor can the company then recover the difference between the amount of the license fee and such cost."

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ON DRUMMERS AND CANVASSERS.

Sales by
sample of
goods to be
shipped
into the
State.

*Robbins v. Shelby County Taxing Dist.*² has generally been looked upon as the leading case on the question of the power of the States to impose license taxes on persons engaged in the sale of goods which are to be shipped into the State on order. In that case it was held that a statute requiring all persons not having a regular licensed house of business in a particular taxing district, and selling goods therein by sample, to pay a license, was a burden on interstate commerce as applied to persons selling goods that were in another State.³ Such a tax cannot be imposed whether the individual taxed be a resident or a nonresident of the State.⁴

Mode of
delivery.

In the case of a sale by a canvasser, the fact that the article is not shipped directly to the purchaser, but is sent to another agent of the vendor residing in the State, who delivers it to the purchaser, and the further fact that separate parts of the article sold are in separate packages when received by the agent for delivery, do not deprive the transaction of its interstate character.⁵

General
merchan-
dise
brokers.

The right to impose a license tax, however, on a firm established and doing business as general mer-

² (1887) 120 U. S. 489.

³ See also *Asher v. Texas*, (1888) 128 U. S. 129; *Corson v. Maryland*, (1887) 120 U. S. 502; *Walling v. Michigan*, (1886) 116 U. S. 446; and see *Stoutenburgh v. Hennick*, (1889) 129 U. S. 141, as to an act of the legislative assembly of the District of Columbia.

⁴ *Stockard v. Morgan*, (1902) 185 U. S. 27.

⁵ *Caldwell v. North Carolina*, (1903) 187 U. S. 622.

A person who takes orders from samples for goods which he engages to deliver, and which are to be shipped into the State from another State, is not engaged in interstate commerce when such orders are not transmitted to such other State, or filled there, but are filled from goods not in the original packages of importation but from goods sent to him in bulk, C. O. D., from such other State. *In re Pringle*, (1903) 67 Kan. 364.

chandise brokers was affirmed in *Ficklen v. Shelby County Taxing Dist.*⁶ It was a material fact in that case that the persons had taken out a general and unrestricted license to do business as brokers, and were thereby authorized to do any and all kinds of commission business, and therefore became liable to pay the privilege tax exacted. Although their principals happened in a particular year to be wholly nonresidents, the fact might have been otherwise, because their business was not confined to transactions for nonresidents. But Chief Justice Fuller said: "What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for nonresident principals, is an entirely different question, which does not arise upon this record."⁷

ON MERCHANTS, PEDDLERS, AND AUCTIONEERS.

While a license tax cannot be imposed on the business of soliciting orders for goods to be transported from another State, such a tax may be exacted from persons already in the State, as merchants, peddlers, or auctioneers, when the dealings are neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another, but the tax is one upon the privilege of selling goods that are already within the State, though they have been brought in

For privilege of selling goods already within the State.

⁶ (1892) 145 U. S. 1.

⁷ Requiring commission merchants to procure a license and give bond for the benefit of persons intrusting them with consignments, is not a regulation of commerce. *State v. Edwards*, (1905) 94 Minn. 225; *State v. Wagoner*, (1899) 77 Minn. 483.

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from other States.⁸ So long as the tax is uniform on all sales by vendors of the particular class, whether citizens of the State or of some other State, and whether the goods sold are the produce of that State or another State, it cannot be considered as an attempt to fetter commerce among the States.⁹

Difference
between
sales of
goods with-
in the State
and of
goods not
within the
State.

It thus becomes necessary to observe particularly the difference between the right of a State or a municipal corporation to impose privilege taxes upon drummers and canvassers on the one hand, and upon merchants, peddlers, and auctioneers on the other. In the case of the first class of dealers, a privilege tax, though it may be general and uniform upon all of the same class, cannot be required of such members of the class as are engaged in soliciting orders for goods which are to be shipped upon the order from another State or from a foreign country. But in the case of the second class, a State may impose a privilege tax when its levy is general and uniform, because the goods are within the State at the time of sale. The distinction may be illustrated by a comparison of *Robbins v. Shelby County Taxing Dist.*,¹ and *Howe Mach. Co. v. Gage*.²

Cases par-
ticularly
noticed
illustrating
the distinc-
tion.

In the former of these cases, it will be remembered, a statute requiring a license tax to be paid by a drummer soliciting trade in goods to be shipped from another State was held to be a burden upon interstate commerce. But in the *Howe Mach. Co. v. Gage* case, the facts agreed, as shown by the record, were as follows: The Howe Machine Company,

⁸ *Emert v. Missouri*, (1895) 156 U. S. 296, affirming *State v. Emert*, (1890) 103 Mo. 241.

⁹ *Woodruff v. Parham*, (1868) 8 Wall. (U. S.) 123.

¹ (1887) 120 U. S. 489.

² (1879) 100 U. S. 676.

a corporation of Connecticut, manufacturing sewing machines at Bridgeport in that State, and having an office at Nashville in the State of Tennessee, sent into Sumner county, for the purpose of selling or peddling machines, an agent who traveled through the country, in a wagon with one horse, for the purpose of exhibiting and offering for sale the company's machines. The machines offered for sale and sold by him were manufactured in Connecticut, and brought into Tennessee for sale; and he paid, under protest, a tax required of him under the statutes of Tennessee for the privilege or license to peddle or sell the machines of the company in Sumner county. By those statutes, "all articles manufactured of the produce of the State" were exempt from taxation; and "all peddlers of sewing machines" were required to pay a tax of fifteen dollars. The Supreme Court of Tennessee having held that the latter provision "levied the tax upon all peddlers of sewing machines, without regard to the place of growth or produce of material or of manufacture," the United States Supreme court, speaking by Mr. Justice Swayne, considered itself "bound to regard this construction as correct, and to give it the same effect as if it were a part of the statute;" and decided that "the statute in question, as construed by the Supreme Court of the State, makes no such discrimination. It applies alike to sewing machines manufactured in the State, and out of it. The exaction is not an unusual or unreasonable one. The State, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden." The distinctive fact in this case was that the agent would either sell the ma-

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Goods
shipped
from
another
State on
C. O. D.
order.

chine he was exhibiting or would send an order to be filled from stock in the possession of the State agency at Nashville. The machine being within the State at the time of the sale or contract of sale, the transaction was not one of interstate commerce.³

In *Norfolk, etc., R. Co. v. Sims*,⁴ these were the facts: A resident of North Carolina ordered from a corporation in Chicago a sewing machine. The machine was shipped under a bill of lading to the order of the buyer, but this bill of lading was sent to the express agent at the point of delivery in North Carolina, with instructions to surrender the bill on payment of a C. O. D. charge. The contention was that the consummation of the transaction by the express agent in transferring the bill of lading upon payment of the C. O. D. charge was a sale of the machine in North Carolina, which subjected the company to a license tax. The contention was held untenable. Calling attention to the fact that the contract of sale was completed as a contract in Chicago, and reviewing some of the authorities on the subject of interstate commerce, Mr. Justice Brown, who delivered the opinion of the court, said: "Indeed, the cases upon this subject are almost too numerous for citation, and the one under consideration is clearly controlled by them. The sewing machine was made and sold in another State, shipped to North Carolina in its original package for delivery to the consignee upon payment of its price. It had never become commingled with the

³ An ordinance requiring merchants to pay a license was held to be valid as applied to the case of sales of goods shipped in bulk to the shipper as consignee, on orders previously given to an agent, and sorted out to customers to whom the separate orders were not given until paid for. *Canton v. McDaniel*, (1905) 188 Mo. 207.

⁴ (1903) 191 U. S. 441.

general mass of property within the State. While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago, and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce.”

The difference between goods imported from foreign countries and those brought into a State from other States, which has been heretofore referred to,⁵ and which results from the absolute prohibition of State taxation of goods imported from foreign countries while they are in the original packages and before they have, by the act of the importer, become incorporated in the mass of property of the State, is important also in this connection. While a State may tax the privilege of selling goods which are within the State and which have been brought in from other States, a tax cannot be imposed upon an importer,⁶ or upon an auctioneer,⁷ for the privilege of selling goods which have been imported from foreign countries and while they are in the original packages.

Difference between sales of imported goods and of goods brought from other States.

ON FOREIGN CORPORATIONS.

As has been shown, in a previous part of this work, a State may exclude foreign corporations from, or impose conditions upon their doing business within, the State, unless such corporation is

For privilege of doing business within the State.

⁵ See *supra*, p. 292.

⁶ *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 419.

⁷ *Cook v. Pennsylvania*, (1878) 97 U. S. 566.

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engaged in interstate commerce or is in the employ of the federal government.⁸ Consequently a State may require of a foreign corporation, not engaged in interstate commerce and not acting as an agency of the federal government, the payment of a tax for the privilege of carrying on business within the State.⁹

SUNDRY OCCUPATIONS AS SUBJECT TO TAXATION.

Exchange
brokers.

A broker, dealing in foreign bills of exchange, is not engaged in commerce, but in supplying an instrumentality. Such a bill of exchange is not an import or export within the meaning of the clause of Article I, section 10, providing that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports." Consequently it has been held that a State tax on all money and exchange brokers was not void as to one dealing in foreign bills of exchange; Mr. Justice McLean saying: "This is not a tax on bills of exchange. Under the law, every person is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax if he engage in the business of a money or an exchange broker."¹

Owners of
grain ele-
vators.

A statute requiring a license from the owners of grain elevators and warehouses situated on the right of way of a railroad is not inconsistent with the power of Congress to regulate commerce.²

⁸ See *supra*, p. 248.

⁹ *New York v. Roberts*, (1898) 171 U. S. 658; *Horn Silver Min. Co. v. New York*, (1892) 143 U. S. 305.

¹ *Nathan v. Louisiana*, (1850) 8 How. (U. S.) 73. See also *Ex p. Martin*, (1871) 7 Nev. 140, that a statute requiring a stamp to be affixed on foreign bills of exchange is valid.

² *W. W. Cargill Co. v. Minnesota*, (1901) 180 U. S. 452, wherein

In *Williams v. Fears*,³ it was held that the levy of a tax by the State of Georgia on the occupation of a person engaged in hiring laborers to be employed beyond the limits of the State, was not a regulation of interstate commerce, and that the tax fell within the distinction between interstate commerce or an instrumentality thereof, and the mere incidents that might attend the carrying on of such commerce.

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XVII

Hiring laborers to be employed outside the State.

And consistently with the idea that insurance is not commerce, it has been held that a statute making it an offense to assume to act as an insurance agent or broker without license, or to act in any manner in the negotiation or transaction of insurance with a foreign insurance company not admitted to do business in the State, is not in conflict with the commerce clause of the Constitution.⁴

Insurance agents and brokers.

the court said: "The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the State between the defendant and the sellers of grain."

³ (1900) 179 U. S. 270.

⁴ *Nutting v. Massachusetts*, (1902) 183 U. S. 553.

CHAPTER XVIII.

TAXATION OF CORPORATE FRANCHISES.

Chapter XVIII.

Of domestic corporations.

THE existence of federal supervision over interstate commerce, and the consequent obligation upon the federal courts to protect that right of control from encroachment on the part of the States, are not inconsistent with the power of each State to control its own internal commerce, and to tax the franchises of its own corporations engaged in interstate commerce, if the tax is limited to the value of the franchise as property and to the value of the property of the corporation situated in the State or habitually used therein.¹

¹ *New York v. Miller*, (1906) 202 U. S. 584; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, (1887) 122 U. S. 326.

"The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports, or tonnage, or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress." *Per* Mr. Justice Field, in *Delaware Railroad Tax*, (1873) 18 Wall. (U. S.) 206.

The franchises granted to a bridge company may be included in the valuation of the company's property for taxation. *Henderson Bridge Co. v. Kentucky*, (1897) 166 U. S. 150, wherein Chief Justice Fuller said: "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate

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That a foreign corporation engaged in interstate commerce cannot be excluded from a State nor be required to comply with stipulated terms as a condition to the right to transact interstate business therein, has been shown in a previous part of this work.² The franchise of such a corporation may be taxed, nevertheless, when it is estimated upon the valuation of its property within the State,³ or upon a proportion of its gross receipts.⁴

Of foreign corporations —
When estimated as a property tax.

Though dealing in imported goods is part of the business of a domestic or foreign corporation, a franchise tax on the business done within the State does not violate the clause of Article I, section 10, of the Constitution providing that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports."⁵

Dealing in imported goods.

of tolls, is too remote and incidental to make it a tax on the business transacted."

A tax on the capital stock is a tax on franchises conferred by the State, and as such not open to objection. *Keokuk, etc., Bridge Co. v. Illinois*, (1900) 175 U. S. 626.

² See *supra*, p. 249.

A State, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and the charge of a fee, based on the percentage of the entire capital stock, does not constitute a tax upon interstate commerce, or the right to carry on the same, or the instruments thereof. *Ashley v. Ryan*, (1894) 153 U. S. 436.

³ *Western Union Tel. Co. v. Missouri*, (1903) 190 U. S. 412.

"The right and privilege, or the franchise as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most States this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation. The right of the States to thus tax it has been recognized by this court and the State courts in instances without number." *Per Mr. Justice Field*, in *Horn Silver Min. Co. v. New York*, (1892) 143 U. S. 305.

⁴ *Maine v. Grand Trunk R. Co.*, (1891) 142 U. S. 217.

⁵ *People v. Roberts*, (1899) 158 N. Y. 162.

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XVIII.

Payment as
a condition
to doing
business in
the State.

When
holding a
federal
franchise

That the exaction of taxation in this form may not result in being a burden upon interstate commerce, it should not be susceptible of exceeding the amount which might be levied directly, as in the nature of a tax on the property of the corporation within the State, nor should the payment of the tax be made a condition precedent to the right of a foreign corporation to carry on such business, but its enforcement should be left to the ordinary means devised for the collection of taxes.⁶

As to a corporation holding a franchise under an Act of Congress, a State may tax the property within its limits belonging to the corporation unless Congress has expressly declared it to be exempt, but the State cannot tax the franchise without permission of Congress.⁷ But the grant of a franchise by Congress to a corporation created by a State, merely renders the State right subordinate to the federal right, and does not destroy the State right to tax the State franchise nor merge it into the federal right, when such result is not expressed or implied in any declaration by Congress.⁸

⁶ *Postal Tel. Cable Co. v. Adams*, (1895) 155 U. S. 688.

⁷ *California v. Central Pac. R. Co.*, (1888) 127 U. S. 1; *Union Pac. R. Co. v. Peniston*, (1873) 18 Wall. (U. S.) 5; *Thomson v. Union Pac. R. Co.*, (1869) 9 Wall. (U. S.) 579.

⁸ *Central Pac. R. Co. v. California*, (1896) 162 U. S. 91.

CHAPTER XIX.

DISCRIMINATION BY TAXATION.

DISCRIMINATING AGAINST PRODUCTS OF OTHER STATES GENERALLY.

IN the second part of this work, in the chapter on Discriminative State Statutes, we have pointed out the invalidity of provisions of State statutes discriminating against the products or the citizens of other States. The most frequent mode in which the States have discriminated has been through the medium of taxation. An occupation cannot be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of other States or against the citizens of other States.¹ But, upon the principle that the courts will not declare a statute invalid upon the suggestion of one who is not shown to be affected by its alleged invalidity, it was said in *Downham v. Alexandria*,² that a municipal ordinance imposing a license tax "on all agents or dealers in beer or ale by the cask, not manufactured in this city but brought here for sale," could not be held to be obnoxious to the commerce clause when it was not alleged that the persons accused of its violation were dealers in "foreign beer or ale," or even in beer or ale manufactured without the State.

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XIX.

Suggestion
of one not
affected by
alleged in-
validity.

¹ *Walling v. Michigan*, (1886) 116 U. S. 446.

² (1869) 10 Wall. (U. S.) 173.

Chapter
XIX.Privileges
and im-
munities of
citizens.

We said above that a tax cannot be so specialized as to operate as a discriminative burden against the citizens of other States. The immunity of non-residents from discriminative burdens, though those burdens may be imposed in the way of restrictions upon their commercial intercourse with the citizens of the State, is probably more directly protected by other provisions of the Constitution than by the commerce clause. A statute of Maryland, requiring all traders residing within the State to take out licenses at certain rates, and subjecting to indictment and penalty nonresidents of the State who, without taking out a license at a higher rate, should sell or offer for sale, by card, sample, or trade list, within the limits of the city of Baltimore, any goods, wares, or merchandise whatever, other than agricultural products and articles manufactured in the State, was held to be unconstitutional, because it imposed a discriminating tax upon the residents of other States. While the court discussed the effect of the statute on commerce, the case seems rather to have involved the application of the clause of Article IV, section 2, of the Constitution, declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."³

Exempting
sales of ar-
ticles pro-
duced in
the State.

A leading case on the subject of discrimination is that of *Welton v. Missouri*.⁴ The plaintiff in error was indicted, tried, and convicted in the State court for dealing in sewing machines which were manufactured outside the State of Missouri, and going from place to place in the State of Missouri selling sewing machines without a license for that

³ *Ward v. Maryland*, (1870) 12 Wall. (U. S.) 418.

⁴ (1875) 91 U. S. 275.

purpose, under a statute which said that "whoever shall deal in the selling of patent or other medicines, goods, wares, or merchandise, except books, charts, maps, and stationery, which are not the growth, produce, or manufacture of this State, by going from place to place to sell the same, is declared to be a peddler." In holding that the statute encroached upon the power which protects a commodity, even after it has entered the State, from any burdens imposed by reason of its foreign origin, the court, through Mr. Justice Field, said: "That portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating State legislation."

The case of *Webber v. Virginia*⁵ involved the validity of a statute of Virginia providing: "Any person who shall sell, or offer for sale, the manufactured articles or machines of other States or Territories, unless he be the owner thereof and taxed as a merchant, or take orders therefor, on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other States and Territories, and shall not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such articles through the agency of another; but a separate license shall be required from any agent or employee who may sell or offer to sell such articles for another. For any violation of this sec-

Exempting
agents sell-
ing articles
manufactured in
the State.

⁵ (1880) 103 U. S. 344.

Chapter
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tion, the person offending shall pay a fine of not less than fifty dollars nor more than one hundred dollars for each offense. The specific license tax upon an agent for the sale of any manufactured article or machine of other States or Territories shall be twenty-five dollars; and this tax shall give to any party licensed under this section the right to sell the same within the county or corporation in which he shall take out his license; and if he shall sell or offer to sell the same in any other of the counties or corporations of this State, he shall pay an additional tax of ten dollars in each of the counties or corporations where he may sell or offer to sell the same. All persons other than resident manufacturers or their agents, selling articles manufactured in this State, shall pay the specific license tax imposed by this section." In that case, wherein the plaintiff in error had been indicted for unlawfully selling and offering for sale sewing machines which had been manufactured out of the State, without having first obtained a license for that purpose, Mr. Justice Field, in describing the effect and determining the validity of the statute, said: "By these sections, read together, we have this result: the agent for the sale of articles manufactured in other States must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the State, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other States. Sales by manufacturers are chiefly effected through agents. A tax

upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the State, it is to that extent a regulation of commerce in the articles between the States. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States.”⁶

A tax on the sale of liquors coming from outside the State is invalid notwithstanding there is a tax on dealers in liquors of domestic origin, when, by reason of the method of taxing the dealer in domestic liquors on the one hand, and of taxing all and each of the drummers and agents of the foreign manufacturer or dealer on the other hand, an immense advantage is given to the domestic product and to the domestic manufacturers and dealers.⁷ A Texas statute imposing an annual tax on the occupation of selling spirituous, vinous, malt, or

Method of
taxation
giving ad-
vantage to
domestic
product.

⁶ A statute which permits the sale by peddlers of agricultural products of the United States without a license, while it forbids unlicensed sales of agricultural products of other countries, makes an unlawful discrimination in favor of articles produced in the United States. *Com. v. Caldwell*, (Mass. 1906) 76 N. E. Rep. 955.

⁷ *Walling v. Michigan*, (1886) 116 U. S. 446.

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XIX.

Exempting
wines or
beer manu-
factured in
the State.

other intoxicating liquors, and providing "that this section shall not be so construed as to include any wines or beer manufactured in this State," was held, in *Tiernan v. Rinker*,⁸ to be inoperative so far as it made a discrimination against wines and beer imported from other States when sold separately from other liquors. It is to be observed that the statute made no discrimination in favor of other liquors of home manufacture than beer or wines. Whilst it grouped the sale of several kinds of liquors as one occupation, it evidently intended that the occupation which consisted in the sale of any one of the several liquors named should be subject to taxation, as though it read, "for selling spirituous, or vinous, or malt, or other intoxicating liquors;" and, as said by Mr. Justice Field, "this being the true construction of the act, there can be no objection to its enforcement where the tax is levied [on] occupations for the sale of other liquors than wines and beers. In the present case the petitioners describe themselves as engaged in the occupation of selling spirituous, vinous, malt, and other intoxicating liquors; that is, in all the liquors mentioned and others not mentioned. There is no reason why they should be exempted from the tax when selling brandies and whiskies and other alcoholic drinks, in the quantities mentioned, because they could not be thus taxed if their occupation was limited to the sale of wines and beer."

A statute of the State of Ohio, known as the "Dow Law," provided "that upon the business of trafficking in spirituous, vinous, malt or any intoxicating liquors there shall be assessed yearly, and shall be paid into the county treasury, as herein-

⁸ (1880) 102 U. S. 123.

after provided, by every person, corporation, or copartnership engaged therein, and for each place where such business is carried on by or for such person, corporation, or copartnership, the sum of three hundred and fifty dollars;” and in defining the phrase “trafficking in intoxicating liquors,” declared that it did “not include the manufacture of intoxicating liquors from the raw material, and the sale thereof, at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any time.” In holding that such an exemption did not operate as an illegal discrimination against the foreign competitor who must necessarily sell at places other than the place of manufacture, because the exemption was not confined to Ohio corporations or copartnerships, but extended as well to foreign corporations whose places of manufacturing were within the State of Ohio, and so likewise the tax was imposed on Ohio corporations which manufactured goods in other States and established places for their sale within the State of Ohio, or which, manufacturing within the State, established places within the State distinct from the manufactory, where their liquors were sold and delivered, the court, in *Reymann Brewing Co. v. Brister*,⁹ through Mr. Justice Shiras, said: “Under this provision, the manufacturers, whether within or without the State, may sell at the manufactory and ship to any part of the State of Ohio, and the incidental disadvantage that the foreign manufacturer is under that if, instead of selling at the place of his plant, he wishes to establish a place within the State of Ohio, he is obliged to pay the tax, does not appear to arise out of any inten-

Exempting
sales at
place of
manufac-
ture.

⁹ (1900) 179 U. S. 445.

Chapter
XIX.

tion on the part of the State legislature to make a hostile discrimination against foreign manufacturers. If an Ohio corporation or copartnership should establish its place of manufacture in another State it would be subjected to the tax if it sold intoxicating liquor at a place within the State of Ohio; and if a foreign corporation should manufacture at a place within Ohio, it would sell its product, in quantities not less than one gallon, without being subjected to the tax. . . . In exempting sales in quantities exceeding one gallon at the place of manufacture, and in imposing the tax upon such sales when made at places elsewhere, the legislature of Ohio was, in the exercise of its police power, aiming to restrict the evils of saloons, or places where liquors are drunk. By imposing the tax upon the latter, the law, to some extent, is calculated to lessen an acknowledged source of vice and disorder."

Discrimination against goods imported from foreign countries.

To goods imported from foreign countries the principle applies. The State of Pennsylvania imposed a license on sales by auction in such a manner that by one statute a discrimination of one-fourth of one per cent. was made against foreign goods, and, by a later modifying statute, while all sales of foreign or imported goods were taxed, those arising from groceries, goods, wares, and merchandise of American growth or manufacture were exempt from such tax. But in *Cook v. Pennsylvania*¹ Mr. Justice Miller said, respecting the statutes: "The Congress of the United States is granted the power to regulate commerce with foreign nations in precisely the same language as it is that among the States. If a tax assessed by a State injuriously

¹ (1878) 97 U. S. 566.

discriminating against the products of a State of the Union is forbidden by the Constitution, a similar tax against goods imported from a foreign state is equally forbidden.”

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XIX.

DIFFERENT MODES OF COLLECTING TAX.

Prescribing different modes of collecting a tax is not, however, a discrimination. The State of Alabama imposed a tax of fifty cents per gallon on all whiskey and brandy from fruits manufactured in the State, the statute further enacting: “ Before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this State, such dealer or dealers introducing any such liquors into the State for sale shall first pay the tax-collector of the county into which such liquors are introduced, a tax of fifty cents per gallon upon each and every gallon thereof.” Collecting the tax on liquors manufactured in the State from the distiller, and that on liquors brought in from other States from those who sold them, it was held, “ institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State,” and is “ an appropriate and legitimate exercise of the taxing power of the States.”²

Not a discrimination.

ABSENCE OF DISCRIMINATION.

But the absence of discrimination does not render taxation in some forms valid. We have had occa-

² *Per* Mr. Justice Miller, in *Hinson v. Lott*, (1868) 8 Wall. (U. S.) 148. And see *Pabst Brewing Co. v. Crenshaw*, (1905) 198 U. S. 17, *affirming* (1903) 120 Fed. Rep. 144.

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Privilege
taxes on
drummers
and can-
vassers.

sion heretofore to point out the distinction between privilege taxes upon merchants, peddlers, and auctioneers, on the one hand, and upon drummers and canvassers on the other, based upon the principle that a privilege tax cannot be required of such members of the latter class as are engaged in soliciting orders for goods which are to be shipped upon the order from another State or from a foreign country. In *Robbins v. Shelby County Taxing Dist.*³ it was strongly urged, as if it were a material point in the case, that no discrimination was made by the statute under consideration between drummers soliciting domestic and those soliciting interstate trade, but Mr. Justice Bradley, in the course of the opinion written for the court by him, said: "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State."⁴

Goods im-
ported from
foreign
countries.

A further illustration will be found by referring to what has already been said regarding the power of a State to tax as property goods in original packages while in the hands of the importer. While this power may be exercised with respect to such goods as have been imported from other States, the positive prohibition contained in the clause of Article I, section 10, that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," forbids the levy and collection of even a general property tax on goods imported from foreign countries, so long as they are in the original packages and in the hands of the importer.

³ (1887) 120 U. S. 489.

⁴ See also *Brennan v. Titusville*, (1894) 153 U. S. 289.

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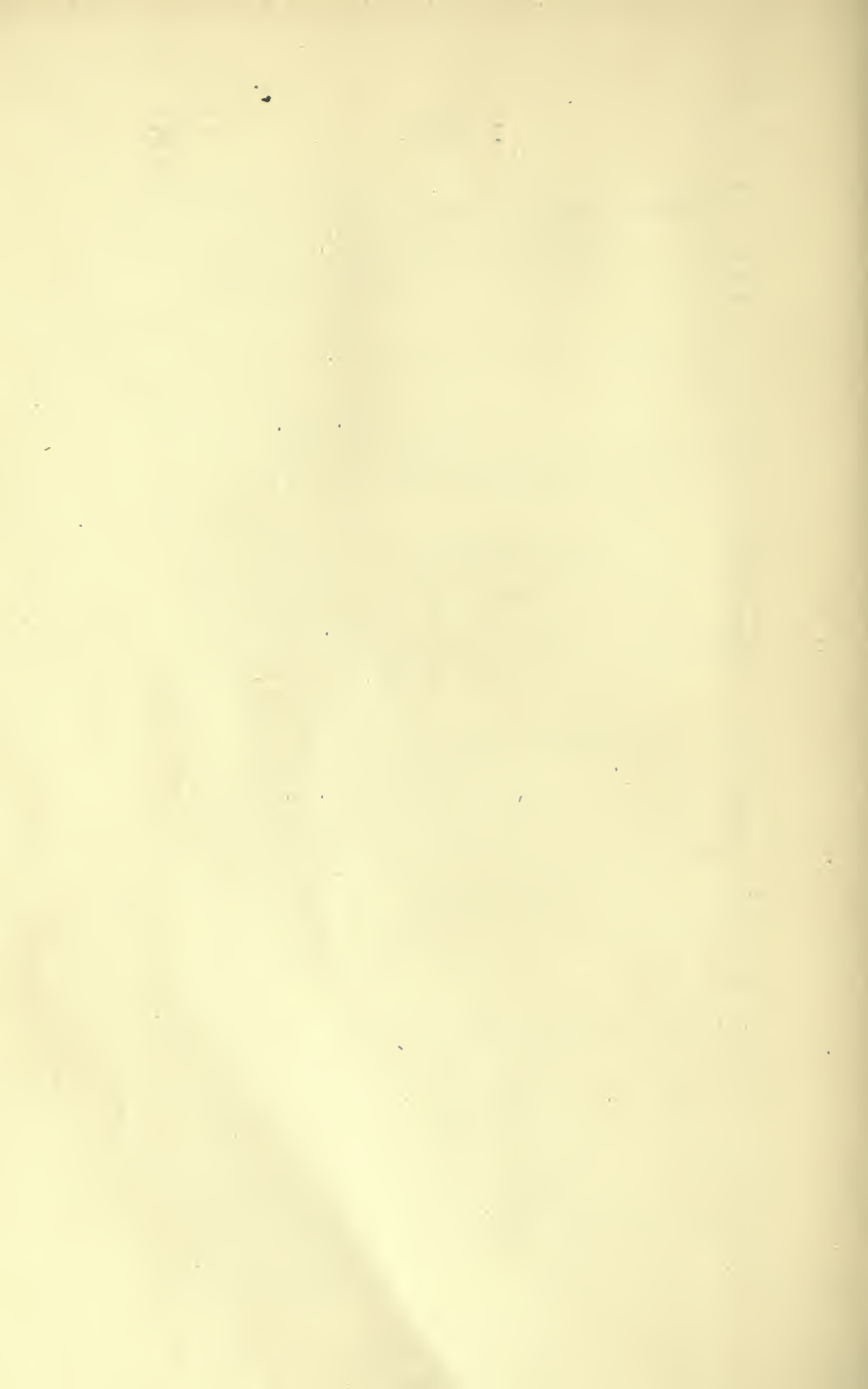
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